UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDINGS CORPORATION, et al.,

Debtors.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

August 23, 2019

10:16 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: NAROTAM RAI

HEARING re Continuance from 8/22/2019 and Evidentiary Hearing on MOAC Mall Holding LLCs Objections

MOAC Mall Holding LLC's Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction (document #2199)

MOAC Mall Holding LLC's Second Supplemental and Amended: (I) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount (document #3501)

MOAC Mall Holding LLC's Third Supplemental and Amended: (I) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #3926)

MOAC Mall Holding LLC's Fourth Supplemental (I) Objections to Reply to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount (document #4450)

Transform Holdco LLC's Reply to MOAC Mall Holdings LLC's (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtor's Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #4454)

So Ordered Stipulation Signed on 5/13/2019 By and Among Sellers, Buyer, and Landlord (MOAC Mall Holding LLC) (I) Extending Time Under Section 11 U.S.C. Section 365(d)(4) for Lease of Nonresidential Real Property and (II) Setting Briefing Schedule (document #3823)

Declaration of Rich Hoge Supporting MOAC Mall Holdings LLC's Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #3927)

Stipulation and Order signed on 6/25/2019 By and Among Sellers, Buyer, and MOAC Mall Holding LLC Extending Time Under 11 U.S.C. § 365(d)(4) For Lease of Nonresidential Real

Property(document #4354, 4687)

Declaration of Thomas J. Flynn in Support of 4450 Fourth Supplemental Objection (document #4451)

Stipulation of Agreed Exhibits Regarding Assumption and Assignment of the MOAC Lease Filed by Thomas J. Flynn (document #4864)

Stipulation of Facts Not in Dispute Regarding Assumption and Assignment of the MOAC Lease Filed by Thomas J. Flynn (document #4865)

Transform Holdco LLCs Supplemental Reply and Cross-Motion to; (A) Strike MOAC Mall Holdings LLCs Fourth Supplemental (I) Objections and Reply to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtors Stated Cure Amount; and (B) Permit Late Filed Responses to Requests for Admission (document #4867)

Declaration of Louis W. Frillman in Opposition to the Proposed Assumption and Assignment of the MOAC Lease (document #4874)

Declaration of Raphael Ghermezian in Opposition to the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flynn (document #4875)

Declaration of Richard Hoge in Opposition to the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flyrui (document #4876)

Declaration - Evidentiary Hearing Declaration of Roger A. Puerto In Support of Transform Holdco LLCs Reply to MOAC Mall Holdings LLCs (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtors Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases (document #4879)

Declaration - Evidentiary Hearing Declaration of Michael Jerbich In Support of Transform Holdco LLCs Reply to MOAC Mall Holdings LLCs (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtors Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases (document #4880)

Opposition Brief MOAC Mall Holdings LLC's Pre-Evidentiary Hearing Brief Regarding the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flynn (document #4889)

Transform Holdco LLC's Amended Supplemental Reply and Cross-Motion to Strike MOAC Mall Holding LLC's Pre-Evidentiary Hearing Brief Regarding The Proposed Assumption and Assignment of the MOAC Lease (document #4903)

MOAC Mall Holdings LLC's Reply Objecting to Transform Holdco LLC's Motion to (A) Strike MOAC's July 8 Supplemental Objection and (B) Permit Late Responses to Requests for Admissions (document #4915)

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Debtors
767 Fifth Avenue
New York, NY 10153

BY: ANGELINE J. HWANG

DLA PIPER LLP
Attorneys for Transform Holdco LLC
1251 Avenue of the Americas
New York, NY 10020

BY: ALANA M. FRIEDBERG
RACHEL EHRLICH ALBANESE
RICHARD A. CHESLEY
R. CRAIG MARTIN

PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

BY: DAVID W. DYKHOUSE

WITNESSES:

MICHAEL JERBICH

RAPHAEL GHERMEZIAN

LOUIS FRILLMAN

ROGER PUERTO

ALSO PRESENT TELEPHONICALLY:

ALIX BROZMAN

TAYLOR B. HARRISON

WILLIAM S. HOLSTE

HOC RI KIM

TERESA LII

SHIRIN MAHKAMOVA

CHRIS STAUBLE

P R O C E E D I N G S

THE COURT: Okay, good morning. In re Sears Holdings Corp et al?

MR. CHESLEY: Your Honor, Richard Chesley, Rachel Albanese, Craig Martin, and Alana Friedberg on behalf of Transform. We're here on the only matter today, which is the Mall of America assumption and assignment motion. We've spoken to Debtors' counsel in light of the nature of this proceeding, discussed with Debtors' counsel just moving forward, so. Unless the Court has any procedural issues, our position on this, Your Honor, in terms of how we would like to proceed today, obviously, a substantial amount of information has been presented to the Court. There are stipulated facts that are agreed exhibits. We'll have five witnesses whose directs have been submitted by declaration.

We believe the issues have been fully formed, and with the Court's approval, we would like to simply proceed with the evidentiary presentation. At that point, we can address argument or any other matters the Court would like. At that point, we think we could do this much more efficiently and effectively today, and again, I don't think there's any surprises to the Court as to what the issues are.

THE COURT: Okay. Well, I normally do not take opening arguments, so my normal practice would be to do just

that, move to the evidence. There is, in the record, fairly recently submitted, a pair of pleadings in which the parties are jousting over the effect of Transform's responding to the request to admit only on July 26th and the application of Rule 36 incorporated by 7036 of the Bankruptcy Rules. To that fact, as well as Transform's motion to strike the fourth supplemental objection and pre-hearing memorandum of law submitted by Mall of America Corp, or MOAC, I have the parties' pleadings on those matters. I can consider them now or later.

MR. CHESLEY: Your Honor, we think, in light of the evidence that's already been presented and will be presented, we think those could be addressed at the end if that would be acceptable to the Court.

THE COURT: Okay. I don't know who's speaking for MOAC.

MR. FLYNN: Right. Good morning, Your Honor. My name is Tom Flynn. I'm representing the lender, MOAC.

THE COURT: Okay.

MR. FLYNN: I'm here with Alex Beeby and David Dykhouse. We would be curious to know the answer to the question on the admissions that were (indiscernible) on the hearing today, but whatever the Court desires on that (indiscernible).

THE COURT: Okay, well, I understand that

curiosity because, obviously, if the Debtor has deigned to admit certain things that may short the evidentiary presentation, it's complicated somewhat by the fact that the parties have stipulated facts, which, in many ways, go to the admissions anyway. But I guess the short answer is that, in keeping with the terms of Rule 7036, I believe I can permit the amendment even after the fact, or retroactively, to extend the time to respond.

That standard is not subject to the excusable neglect Pioneer standard that is incorporated in other extensions of time. It still has to be for cause, although that requires a balancing of some basis for why it wasn't submitted timely, i.e., if it was intentionally not submitted timely, to thwart discovery or create a false impression in the opponent's mind as to what was at issue in the case. Or, as relatedly, the movant, under Rule 36, while seeking to enforce that rule, was in the Court to be truly prejudiced in presenting its case by the delay. I obviously would not grant such retroactive extension, or such a retroactive extension.

But I don't believe those types of facts pertain here. It appears to be that the delay was inadvertent, not part of a strategy, that the parties were actively engaged throughout the process, and most importantly, I don't believe that MOAC was unduly prejudiced by the delay. Most

of the admissions that are sought are actually agreed to, at this point. A couple of them were confusing to me, and would be hard to decide what they meant in the first place. I think the two that may or may not be at issue, although, frankly, the stipulated facts may reflect this too, and it's really more of a legal interpretation as to what 365(b)3 provides when it seeks a comparison between financial operating condition at the time the lease was entered into and the present time, would be Request Nos. 5 and 6, where there's: "An admission of the financial condition of the assignee is not similar to or better than the financial condition of Sears owner about May 30, 1991." And Request No. 6: "Admit that the operating performance of the assignee is not similar to or better than the operating performance of Sears owner about May 30, 1991."

At one level, I think that, based on one reading of the relevant provision of § 365(b)3, I believe the facts establish that, but based on another reading, which Transform has always made clear is its interpretation, it wouldn't be deemed admitted. So, in any event, this doesn't appear to be the type of factual issue properly covered by a request to admit in any event. As I said, almost all of the other requests to admit I think are pretty well established already by the stipulated facts or not raised as a factual issue. For example, Request No. 9" "Admit that you do not

currently plan for Transform Lease Co., LLC. to operate as a retail distributor." There are a number like that.

The ones that I question, again, as to whether they're factual, since they contain terms that are really more aptly construed as a matter of law would be Request No. 13, and the last two, 14 and 15, which I think go to issues that really are not at issue in the matter, which go to those -- just to remind you all: "Admit that assumption and assignment of the lease is not necessary to support Transform's retail operations for Transform to maintain its financial condition."

And then Request No. 15 says: "Admit that Transform's retail operation are not sufficient to maintain Transform's financial condition, which is dependent upon assumption and assignment of the lease." I'm not really sure what that -- those actually are asking for, but in any event, I don't think they're -- I can't imagine a timely response to -- I don't even know what -- I'll go back. I don't know what it would mean to deem those be admitted. So, I'm going to grant Transform's request to extend, retroactively, the time for it to have responded to the requests for admission.

As far as Transform's request that the fourth supplemental objection and the pre-hearing memorandum be stricken, the pre-hearing memorandum is just that. It's a

memorandum. It really doesn't raise any new issues. It cites cases that have already been cited and that I could have looked up anyway, if they had not previously been cited. So, that's not stricken, for what it's worth. It's another issue as to whether that's part of the cure, as it really was not contemplated by the case management order, but I won't keep it out of the record.

As far as the fourth supplemental objection is concerned, I don't believe it raises any particularly surprising issues for Transform. It didn't move the playing field. I think it just elaborated on the grounds for MOAC's objection to assumption and assignment to Transform. If I'm missing something there, Mr. Chesley, you can tell me, but it just seems to me that, again, it's adding detail to arguments that have previously been made, as opposed to, for example, what counsel tried to do yesterday in another assumption and assignment objection is, during oral argument, raise a wholly new basis for objecting to the assignment.

MR. CHESLEY: Your Honor, I don't think there's anything new in there as to the fourth. It really related to the issues of the request to admit, so we're ready to proceed.

THE COURT: Okay. All right, so, that's my ruling on those two motions.

MR. CHESLEY: Thank you, Your Honor. Unless the Court has anything further, any questions for us, we would move to our first witness.

THE COURT: All right, that's fine.

MR. CHESLEY: Transform's first witness would be Michael Jerbich. And Your Honor, for ease of the witnesses, we put the exhibit binder as well as each of their declarations on the witness stand.

THE COURT: Okay.

MR. CHESLEY: And Ms. Albanese will address Mr. Jerbich's testimony.

THE COURT: Okay. Would you raise your right hand, please?

MR. JERBICH: Yeah, sure.

THE COURT: Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. JERBICH: I do.

THE COURT: And could you spell your name for the record, please?

MR. JERBICH: Michael, M-I-C-H-A-E-L, Jerbich, J as in jam, E-R-B as in boy, I-C-H.

THE COURT: Okay. Good morning. Mr. Jerbich, you submitted a declaration in this case, in this proceeding in connection with the assumption and assignment of the Mall of

America lease dated August 18th, 2019. It's intended to be your direct testimony in this matter. Sitting here today, would this still constitute your direct testimony?

MR. JERBICH: Yes, it would.

THE COURT: And there's nothing that you would change in it?

MR. JERBICH: No, there is not.

THE COURT: Okay. All right, so, Mr. Flynn, you can proceed with cross.

MR. FLYNN: Thank you, Your Honor.

CROSS-EXAMINATION OF MICHAEL JERBICH

BY MR. FLYNN:

Q Mr. Jerbich, my name's Tom Flynn. I think we've met before once already.

A Correct.

Q I'll be referring to my client as either the Mall of America, MOAC, or the landlord. Is that okay?

A Sure.

Q They mean basically the same thing. I understand that you submitted a declaration here today and you think that that declaration primarily relying on the Reicher declaration, provides substantial financial information regarding the ability of Transform HoldCo to meet its financial obligations for the proposed and assumed leases, is that right?

A I'm not sure I understand what you're asking there.
Q Well, in Paragraph 6 of your declaration --
A Okay.
Q -- if you remember that.
A I just didn't hear what the question was.
Q For financial information concerning adequate assurance of future performance, you're relying primarily on the Reicher declaration. Is that correct?
A Correct.
Q Have you read the Reicher declaration and it's attachments and exhibits?
A I have.
Q Is there any other -- there is no other financial information in your declaration referred to that would support adequate assurance of future performance, is that correct?
A No other testimony regarding adequate assurance?
Q No financial information, other than that contained in the Reicher declaration.
A There's no other financial information, no.
Q Have you reviewed the exhibits to the Reicher declaration? That would be the balance sheet and the other exhibits, have you done that?
A I've seen them, yes.
Q Are you relying on that information?

A For the adequate assurance?
Q Yes.
A In part.
Q Is there any other financial information that you referred to in your declaration that you --
A There's nothing else referred to in my declaration, no.
Q Just a minute. Now, in the Reicher declaration, you're familiar with the fact -- did you read the whole declaration including what was filed in the Court by Mr. Reicher?
A I've reviewed it. I would imagine I've read the whole thing. Do you know which area this is? Is there something specific you're going to ask about that, so I can find it in here?
Q Yes. I just wonder if you've read it.
A I've read it.
Q In that declaration, Mr. Reicher states that the failure -- he talks about selected number of leases that you would like to -- that your company would like to assume and assign. Is that correct?
A Yeah, I think we've assumed, now 656 out of 660, yes.
Q Did you put anything in your declaration about that?
A Somewhere in there. It said 660 leases.
Q And they've been assumed and assigned? Where did it say that in the declaration?
THE COURT: I'm sorry, Mr. Flynn. When you say

assumed and assigned, you mean assumed by the Sears Debtors and assigned to Transform or to be assigned by Transform to someone else?

MR. FLYNN: To be assigned by Transform to someone else. Thank you, Your Honor.

A Oh, I misunderstood that, I apologize. What's the question?

Q Did you put any information about what's been assumed and assigned by Transform to someone else in your declaration?

A To someone else, I don't believe the declaration -- I'd have to look at it closely. I know there's a section of the declaration that talks about how many leases we were assuming.

Q In the declaration, Mr. Reicher states, if you remember --

A Oh, I thought you were asking my declaration. I apologize.

Q Well, I'm talking about what you're relying on for adequate assurance and in the Reicher declaration, the failure to assume and assign these leases, according to him, would be the end of Sears. Did you know that he said that? Do you remember that he said that?

A I don't recall that exact phrase but if it's in the declaration, I'm sure it's in the declaration.

Q Has Transform assumed and assigned all of the leases, do you have anything about that in the declaration, in your declaration?

A May I view the copy of my declaration just to review? There was a section in there regarding assuming the leases.

THE COURT: Do you want to show him his declaration?

A I just don't have it in front -- I can grab it, if you like. I don't know --

Q I have a marked up copy here that --

MR. CHESLEY: The small binder.

MR. JERBICH: Oh, it is the small binder. I apologize.

MR. FLYNN: It's in the small binder.

MS. ALBANESE: They're alphabetical, number is one.

MR. JERBICH: Okay, thank you.

A I recall a reference in my declaration about the 660 leases.

MR. CHESLEY: Your Honor, can I just point the witness to Paragraph 4? I don't think we need to -- I'm sorry, Paragraph 5.

MR. JERBICH: Right, okay.

A (indiscernible) "sought to assume and assign approximately 660 retail and non-retail leases to

Transform."

Q It doesn't say anything about what -- how many have been successfully assumed or assigned, does it?

A This does not say that.

Q Yes.

A But I thought I was aware that there were only three now that aren't.

Q Do you have any evidence to support that, besides your word here today?

A I don't have a document to support that, if that's what you're asking. I just --

Q So there's no exhibit and there's nothing in your testimony --

THE COURT: I'm sorry, again.

MR. FLYNN: Excuse me.

THE COURT: When you say, "assumed and assigned" --

MR. FLYNN: Right.

THE COURT: -- you mean by the Debtors to Transform or by Transform to someone else?

MR. FLYNN: By Transform to someone else?

THE COURT: All right, because there's -- I mean, the docket of the case reflects the number of leases that have been assigned by the Debtors to Transform.

MR. FLYNN: Yeah, it's Transform to someone else.

A And that's what I was referring to.
Q And there's still assignments to be done? Is that right?
A From Transform to third parties?
Q Yes.
A Potentially.
Q Including this one, here today, right?
A No. This could be subleased. I don't think this needs to be assigned.
Q You're seeking assume --
A We're seeking assume -- maybe I'm not understanding the legal distinction, so if you can -- we're seeking to assume this lease, for the Debtor to assume it and assign it to Transform.
Q Right.
A Right.
Q So, there's leases that haven't been assumed and assigned, is that correct?
A I believe three.
Q In any case, you don't know for sure, and you have no documents or evidence to support that?
A Well, I think -- I mean, I guess we can scour the docket, but I thought there were only -- I thought there were only three that were not thus far assumed by Sears and assigned to Transform.

Q And how many are assigned -- how many of the -- there's only three and you didn't testify to that in your --

MS. ALBANESE: Objection, Your Honor. I think Mr. Flynn is conflating the assumption by Sears and assignment to Transform with Transform's subsequent assignment of those leases and confusing the witness.

MR. FLYNN: All right.

Q At any rate, have you reviewed the balance sheet contained in the Reicher declaration? Did you review that?

A I'm not an accountant. I have reviewed it, but I'm not a --

Q You've testified, did you not, that that information is sufficient to give the Mall of America assurance -- the required assurances of future performance. That information was sufficient. You testified to that, didn't you?

A I did. I have.

Q And if you're not an accountant --

A I'm not an accountant.

Q -- and you have no particular skill or ability to review that or understand it, (indiscernible) it, is that what you're saying?

A That's not at all what I'm saying. I don't think I said I have no particular --

Q Did you review it?

A I did review it, yes.

Q Okay, and you're not an accountant. Did you prepare or help prepare those accounting statements?
A I did not.
MR. FLYNN: Excuse me, Your Honor.
Q I'd like you to take a look at MOAC Exhibit 12.
A I have it in front of me.
Q Would you turn to the balance sheet, which is, I believe, the -- I don't believe there is a balance sheet on Exhibit 12, is there? I think there is.
THE COURT: Well, it's about four pages in. We refer to the draft, Consolidated HoldCo, Transform Consolidated HoldCo balance sheet?
MR. FLYNN: Yes. Yes.
THE COURT: It's right before the organizational chart.
A Page MOAC 00008.
Q Okay. Thank you.
A Okay.
Q You're relying on that, in part, for your assurance of adequate performance in the future?
A In part.
Q And do you have any other financial information, either referred to in your testimony as far as --
A I don't think there was any other financial information referred to in my testimony, other than the fact that the

REA only requires, a subtenant of ours, a $50 million dollars net worth.

Q That's not financial information, that's --

A Okay.

Q So, this is the exclusive financial information you're relying on? This attachments to the Reicher declaration in Exhibit --

A Yes.

Q The balance sheet is not -- has not been, according to what -- and this is what you're relying on -- it hasn't been completed. You understand that? Did you read that?

A Where are you referring to when you asked me to read that?

Q Well, let's start with the top line. It says "draft".

A Correct. It does say "draft".

Q What does "draft" mean to you? That's the final document that -- or does that mean somebody has done a draft?

A "Draft" to me means draft, yeah.

Q So, this isn't the final. This is an initial, or draft. This has not been completed. Is that the way you read it?

A I read it -- I think the document speaks for itself.

Q Yeah, I do too. So, could a reasonable person read that and say, well, this isn't anything final. This is

simply an initial draft.

MS. ALBANESE: Objection, Your Honor.

THE COURT: Sorry?

MS. ALBANESE: Objection, Your Honor. I think the witness has answered the question and he's badgering him.

THE COURT: That's fair. Well, I don't know if he's badgering, but it's redundant, at this point.

Q Did you read the footnotes to the balance sheet, sir? Did you?

A Yes.

Q Does that indicate that the numbers could change?

A It says it's subject to change.

Q All right, it says it's subject to change? Okay. Did your testimony indicate that you -- did you ever get a final draft? You never did, did you? Of this balance sheet, did you?

A I don't believe I've gotten a document beyond what I have here.

Q The footnotes say, in part, "Please note this draft is based upon schedules," okay? "And may be adjusted." Is that right?

A It does say, "Please note this draft is based upon schedules of APA," yes.

Q And is subject to change?

THE COURT: He already answered that one.

Q Is this something that you're claiming we can rely upon as adequate assurance of future performance? Is that your testimony here today? That we can look at this and rely upon this?

A I think 650-some odd other landlords have, yes.

Q What -- what --

MR. FLYNN: I ask that to be stricken.

THE COURT: No, I won't strike that.

MR. FLYNN: All right.

Q We'll get to that in a minute, but so, we're supposed to -- the Mall of America is supposed to be assured when it doesn't have a final balance sheet that's subject to change? That's supposed to assure us? Are you serious about that?

A Well, in addition to the security that we offered you, yes.

Q So, just a minute, here. I'd like you to refer to that part of the exhibit that talks about adequate assurance information, marked as MOA007, okay? Do you have that in front of you?

A I have the binder open to MOAC-7, yes.

Q What does that purport to show?

A It's a Form 10-k.

Q It shows -- I'm talking -- or it's talking about the same thing, this --

A Oh, no, I apologize. I'm -- what page are you

referring to, then?
Q It's 007.
THE COURT: It's the same exhibit --
MR. JERBICH: Oh, the same exhibit. I turned to (indiscernible).
THE COURT: Right, not Exhibit 7. It's the same one that you were in, but just a page before.
MR. JERBICH: All right.
A Okay.
Q By the way, a question about the balance sheet. Has that been -- has the balance sheet been signed by anyone? Is there any indication that's been signed by a CPA or anybody else that would certify to it?
A I'm not certain of that.
Q I'm going back to the balance sheet. Has that been signed by anyone?
A I just answered. I'm not certain of that.
Q Going back to Page 007, you're familiar with this. You're reviewed this, I assume?
A Again, I've looked at all the exhibits.
Q All right, all right. Did you read the disclaimer in that?
A I'm sure in my review I reviewed it at some point.
Q So, on its face, this -- your financial information says that it's unreliable, doesn't it?

A I'd have to read it to see if that's an accurate characterization.
Q You haven't read this before?
A I said I read it, but I'd like to refresh myself.
Q Well, let me help you. Let me read portions of it.
A Please.
Q "This letter includes projections, forecasts, and forward-looking statements which refer to Transform's and can be," quote, "no assurance as to Transform or the company's future performance." That's what it says. Do you see that in there?
A I do see that in there.
Q Are we supposed to be -- well, I'll let that -- it goes on to state that: "This financial interest (indiscernible) speaks only to the relevant date," and they assume, "no obligation to update it." Did you read that portion of the disclaimer?
A Yeah, I believe I mentioned I read all of it. So.
Q We have received no updates, and nor are they promising to give us any, and you don't prepare these things. Is that right?
A There's three questions in, if you want to break it down. You haven't received an update to the question or?
Q I'll ask another question. They also go on to state they "have no duty to advise any person that any of the

conclusions in the letter, and the declaration, have changed," right?

A You're asking whether it says that?

Q Yes.

A I don't see that specific language, but if you point me to it, I'm sure I'll find it.

THE COURT: I can read it.

MR. FLYNN: Thank you.

MR. JERBICH: Thank you.

Q It goes on to state: "This letter," and they're talking about the Reicher declaration, I believe.

A Okay.

Q "and its attachments, is not intended to provide the basis for any decision on any transaction." Did you read that part of it?

A Again, I've read the entire thing.

Q I assume you don't dispute your own document. That's what it means, doesn't it?

A I think this is an exhibit to Mr. Reicher's declaration, not mine.

Q Then you don't endorse Mr. Reicher? You don't think he's --

A I didn't say that at all.

Q You don't endorse your own --

MS. ALBANESE: Objection, Your Honor.

MR. JERBICH: That's silly.

MS. ALBANESE: The witness didn't say that.

THE COURT: Look, I've read it. I get your point.

MR. FLYNN: Thank you.

THE COURT: I've read similar language attached to disclosure statements, 10-ks, et cetera. You can move on.

MR. FLYNN: All right. Well, this was provided to us to give us assurance.

THE COURT: Ultimately, it's my decision, sir. But I get your point.

MR. FLYNN: All right.

MR. JERBICH: Along with a one-year letter of credit.

Q I do want to -- and I'll make this short, one more section. This document, it says: "The recipient should make its own independent basis and legal decisions based upon the information and advice and the recipient's own judgments concerning the adequacy of this disclosure." Isn't that what it says?

A Can you point me to the exact sentence you're referring to?

Q Second from the last.

THE COURT: Actually, the third to the last.

A Yes, it does say that.

Q Does the Mall of America, then, I assume you're telling

us is allowed to make its own decision about the adequacy of this information.

A I think that's probably boilerplate language to a financial statement that talks about forward-looking thoughts and what have you.

Q So, that's just meaningless?

MS. ALBANESE: Your Honor, objection. I think it's --

THE COURT: It's meaningless in the context of my determination as to whether there's adequate assurance of future performance.

MR. FLYNN: Sure.

THE COURT: So, yes. The answer is yes. It's meaningless.

MR. FLYNN: All right. Thank you, Your Honor.

THE COURT: Okay. Obviously, the Debtor and Transform have the burden of proof.

Q You understand that you have to prove not only financial wherewithal but you have to prove proof of adequate -- of performance, not only financial but operating performance. Is that right?

A In what sense?

Q You understand that the Court requires you to prove financial wherewithal and operating performance. You don't understand that or you do, or?

A I'm aware of adequate assurance as far as (indiscernible) of future performance.

Q Just so we're clear, Transform Co. is not going to operate a store at the Mall of America, is that right?

A Correct. It's an asset of Transform Co., correct.

Q There will be no operations or operating performance by Transform Co. at the Mall of America, is that right?

A Our plan is not to operate. That is correct.

Q As you sit here today, do you know -- do you have a tenant ready to take over that space and operate in it?

A As I sit here today, I have interest from multiple tenants, but it's a process that takes time.

Q So, you have no tenant, at today's hearing, that would take over and operate in that space?

A Today? Literally today? No.

Q Yes, literally today. All right. There's nothing in your testimony submitted to the Court by declaration that indicates any evidence or discussion how Transform Co. will or a hypothetical tenant might operate from the premises, is that correct?

A Can you be more specific with your question? I'm not sure I'm understanding it.

Q Well, you have nobody that's going to operate in the premises as you sit here today.

A You asked me that earlier if I have a tenant today and

I said no.

Q You're unable to show today anybody that could be -- because you have no one.

A I don't think that's an accurate characterization of what I said at all. The lease is significantly below market, we're paying $10 (indiscernible).

THE COURT: All right, just stop. Sir, you don't need to ask the same question three times.

MR. FLYNN: You bet. Yes, Your Honor.

Q There's no one that -- you did say --

MR. FLYNN: That's all I have, Your Honor. Thank you.

THE COURT: Okay. I would like to follow-up on one of Mr. Flynn's question.

MR. JERBICH: Sure.

THE COURT: You're not an actual employee of TransCo, right? You work -- you're a consultant for them?

MR. JERBICH: Correct.

THE COURT: Has Transform, excuse me, placed any limitations on you as far as the types of tenants that you are soliciting?

MR. JERBICH: No.

THE COURT: None? So, if --

MR. JERBICH: I mean, to the extent, obviously, within the parameters of the lease, the REA.

THE COURT: But no other limitations?

MR. JERBICH: No.

THE COURT: As far as who the types of prospective tenants that you are speaking with, what, generically, what sorts of businesses are they in? How would they use the space?

MR. JERBICH: We've had dialogue with an international retailer that's expressed interest in one of the floors. A national retailer as well. And there are really opportunities even beyond that.

THE COURT: Okay. Such as?

MR. JERBICH: Well, could be healthcare use, there's a tech center being built nearby coming up. It's a 73-year lease, Your Honor, so there's -- sky's the limit, honestly.

THE COURT: Well, it's a shopping mall, right?

MR. JERBICH: It is.

THE COURT: So, what would be the basis for it being used for office purposes? I'm assuming that's what you mean when you say a tech center.

MR. JERBICH: I just used it as an anecdotal example. There is office in the mall as well, right now.

THE COURT: Of what size? I mean, is it like back offices for the Mall of America Corp. or office --

MR. JERBICH: I want to say -- there's a full

campus building, 40- to 60,000sf of office space. I don't have the exact size, Your Honor, but it's -- that wouldn't be a primary plan. The primary plan would be for a retailer but we don't want to limit it because it's not limited within the REA.

THE COURT: Okay.

MS. ALBANESE: Your Honor, may I have a couple --

THE COURT: Sure, if you want -- a redirect?

MS. ALBANESE: -- minutes to redirect? Yeah.

THE COURT: Sure.

MS. ALBANESE: Thank you.

REDIRECT EXAMINATION OF MICHAEL JERBICH

BY MS. ALBANESE:

Q Mr. Jerbich, can you describe what the lease requires the tenant to pay and the additional security that you mentioned that Transform has offered to MOAC?

THE COURT: Well, I have that in his direct testimony.

MS. ALBANESE: Okay.

MR. JERBICH: Okay.

MS. ALBANESE: Okay.

Q Just one point of clarification. You had mentioned that it was a one-year letter of credit, but I believe that's not accurate. Can you just clarify what the one-year security --

A We would escrow a one-year security with taxes, CAM, insurance, and rent.
Q Okay, which adds up to?
A About $1.2 million. $1.1m, $1.2m.
Q Thank you.
A Full financial obligation.
Q Okay. Thank you, Mr. Jerbich.
THE COURT: Any redirect?
RECROSS-EXAMINATION OF MICHAEL JERBICH
BY MR. FLYNN:
Q You know, there is an office building attached to the mall. It's not in the mall. Is that correct? Do you know that?
A It's attached, okay.
Q It's not --
A It's on the campus.
Q It's not in the mall.
A It's on the campus, correct.
Q There's also hotels attached to the mall, but not in the mall.
A Okay.
Q And you are required, according to your own testimony, to be limited to a first-class retail operation not inimical to the mall. You quoted that in your own testimony, is that right?

A Not -- yeah, and I walked many malls in the last year and there's a variety of uses within a mall in 2019. In first-class malls.
Q In your declaration, did you give any testimony -- you didn't give any testimony other than -- you can -- how you would protect the mix of retail clients at the mall. How you would do that. You didn't give any testimony to that effect.
A I didn't because I do not believe our REA or lease requires us to.
Q Well --
A In fact, it specifically allows us for virtually any lawful use.
Q "Retail not inimical to the mall."
A Not inimical to the mall, correct.
Q And also, the lease requires that any use be in harmony with the other tenants in the mall. Is that right? Is that right?
A Can you point me to that specific portion of the REA?
Q Prohibitions, on Part D of the lease. Have you read the lease?
A Can you tell me which MOAC tab that is?
MR. CHESLEY: It's 1.
MR. JERBICH: It's 1?
Q Tab 1. In the -- excuse me, it's in the REA.

A Okay.

MR. CHESLEY: So, 3.

MR. JERBICH: Three, thank you.

Q Page 55. Prohibitions.

A Yeah, I'm reading it. It says: "in harmony with the development of operation of a first-class regional shopping center containing," and it goes: "air conditioned mall, hotels, family entertainment center, not limited to the following," and it goes on. Is there a specific -- we don't plan on putting (indiscernible).

Q You understand that whatever you put in there has to be in harmony with the rest of the mall. You understand that, correct?

A It says: "which use or operation is obnoxious to or out of harmony with the development or operation of a first-class regional mall." We have no intention of doing anything that's not in line with what a first-class mall would have.

Q But you have no proposal for anybody that -- all right.

MR. FLYNN: That's all I have.

A It's a 73-year lease. We don't have one today, we said that.

MS. ALBANESE: Your Honor, just one point. I just wanted to point the witness to Section 22(c) of the REA just to clarify one point that Mr. Flynn had said, and that's on

--

THE COURT: Well, you mean ask him a question about it or you just want to point it out?

REDIRECT EXAMINATION OF MICHAEL JERBICH

BY MS. ALBANESE:

Q Does the REA permit non-retail use? Could you look at Section 22(c) of the REA?

A Do you have a page on that, Rachel?

Q It's 126 of the REA.

A As I look, I do recall reading that it does, but let me confirm. That is correct.

MS. ALBANESE: Thank you.

MR. FLYNN: What section? Excuse me, what --

MS. ALBANESE: 22(c) of the REA.

MR. FLYNN: What page?

MS. ALBANESE: Page 126.

MR. FLYNN: Okay. Just so they're clear, the only non-retail activity you can do there is as reasonably incidental to your retail activity. That's what it says.

MR. JERBICH: I mean, just in the mall itself, you have a Crayola exhibit, you have a roller coaster, you have a miniature golf course.

MR. FLYNN: I'm talking about what you're bound by. This REA --

THE COURT: This provision, i.e., Provision 22(d).

MR. JERBICH: And so, what was your question again? I apologize.

MR. FLYNN: You're bound by this and it does --

MR. JERBICH: We're bound by the REA, yes.

MR. FLYNN: And it requires only non-retail activities that are reasonably incidental to a retail activity. For instance, an ATM machine or something like that. That's all it was. You're required to do retail.

MR. JERBICH: I don't believe that's --

MR. FLYNN: Well, we can --

MR. JERBICH: -- that we're required to do retail there.

THE COURT: Well, you all can point me to the relevant sections. Okay, any more questions? All right, you can step down, sir.

MR. JERBICH: Thank you, Your Honor. .

MR. CHESLEY: Next witness, Your Honor, is Roger Puerto, and Mr. Martin will handle his testimony.

THE COURT: Okay. Would you raise your right hand, please? Do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

MR. PUERTO: I do.

THE COURT: Could you spell your name for the record?

MR. PUERTO: R-O-G-E-R, last name Puerto. P as in

Paul, U-E-R-T-O.

THE COURT: Mr. Puerto, you submitted the declaration dated August 18th, intended to be your direct testimony in this proceeding. Sitting here today, is there anything that you'd like to change in it?

MR. PUERTO: No.

THE COURT: And you understand it is your direct testimony?

MR. PUERTO: Yes.

THE COURT: Okay. All right. Any cross?

MR. FLYNN: Your Honor, I'd like to voir dire the witness for the purpose of making an objection.

MR. MARTIN: Your Honor, before -- just a housekeeping matter before that. Craig Martin, for the record. Paragraph 7 and one sentence of Paragraph 8 were redacted and filed under seal, and we've discussed with the witness, and I've discussed with Mr. Flynn that the key parts there are the actual numbers, so we may use the terminology -- the numbers in Paragraph 7 or the number in Paragraph 8 so that we can avoid actually stating the sealed information and not have to worry about sealing the courtroom or taking any further action.

THE COURT: Okay. That's your understanding too, Mr. Flynn?

MR. FLYNN: Yes, Your Honor.

THE COURT: Okay. All right, so, you can go ahead.

VOIR DIRE OF ROGER PUERTO

BY MR. FLYNN:

Q In Paragraph 7, you state that: “appraisals were conducted,” is that correct?

A Yes.

Q Did you do those appraisals?

A No.

Q Have those -- those appraisals haven’t been submitted into evidence to the Court?

A Not to my knowledge.

MR. FLYNN: I move to strike references to the appraisals as hearsay.

MR. MARTIN: Would you like a response, Your Honor?

THE COURT: Sure.

MR. MARTIN: Initial point is, we’re not offering Mr. Puerto as an expert on valuation. We’re offering him as a fact witness. He is stating that he is aware that appraisals have been done and an aggregate value reflect the amount of value represented, and certainly, the testimony is then designed to reflect the process that he’s undertaking to maximize that value. And I believe is testimony will be focused on his actions and his increase in that value. And

so, we're not offering the fact of the appraisals for the truth of the matter asserted, but just that they've been done and they create a -- as a matter of fact, that they have been done; as a matter of fact, they contain an aggregate value. So, I would request that the Court permit the statements in Paragraph 7.

THE COURT: Okay. Well, he's clearly not offered as an expert on valuation and I won't take this -- these dollar amounts as the value of the portfolio but simply as evidence that Transform believes that it has a valuable portfolio and that it's seeking to realize it.

MR. FLYNN: Thank you, Your Honor.

Q I would also like to talk about Paragraph 8. You testified that Transform could sell over -- or excuse me, a certain dollar amount, that's the second sentence in Part 8.

MR. FLYNN: I would move that removed -- object to that as speculation and not a fact.

MR. MARTIN: Would you like a response to that, Your Honor?

MR. FLYNN: And we could tie these together, Your Honor. And it goes on to say in addition, Transform could potentially sell, and then it gives a number, worth of unencumbered property as well. That is pure speculation. I move it be stricken.

THE COURT: Well, you can ask him about it and how

he came up with that. I don't see it as pure speculation. I mean, you can question him on the basis for why he believes that.

MR. FLYNN: All right.

THE COURT: And again, knowing that he's not an expert.

MR. FLYNN: Well. And again, I would -- well, if --

Q You are attempting to sell certain assets of TransCo, is that right? Or monetize them? Is that what you're trying to do?

A Yes.

Q Has that been completed?

A No, it says it's potentially what could be sold over the next six months, so they have not been completed.

Q But as you sit here today under oath, you have no idea what you're going to sell, isn't that right?

A No, I have an idea based on the numbers that I put in the declaration based on the pipeline of deals that I have, or in the process of negotiating with various buyers. They could or could not happen. But, based on a degree of certainty, I'm comfortable saying in the next six months, this is what we can sell, based on the pipeline and just in general, the way I've been selling real estate for the past 18 months prior.

Q But you don't know for a fact that that's going to happen, as you sit here today in Court under oath?
A It's not -- I don't know for a fact. It's real estate. Anything could change in a single day.
Q Thank you.
A Yeah.
Q And then you say --
MR. FLYNN: I would like to raise an objection to Paragraph No. 9, Your Honor.
Q Therein, you state that: "The Mall of America, MOAC, as a landlord, is rarely concerned with the ability of Transform to meet its continued financial obligations. Rather, they are principally concerned with extracting value."
A That's my opinion.
Q You don't know that. That's not a fact.
A I don't know the specific mall, but in general, based on how I've sold real estate, that is usually the case. No, I don't --
MR. FLYNN: I would move to strike that is pure, inappropriate opinion about the mind of my client.
THE COURT: Well, it's also the opinion of several (indiscernible) decisions by bankruptcy judges, so I'll deny that motion.
Q Are you in charge of getting tenants at the mall? Are

you working with Mr. Jerbich on that, or?
A No, I'm not in charge of getting tenants.
Q The mall will testify that they'll put an anchor tenant in there for almost no rent. Would they make a lot of money and grab the equity out of your lease? Does that make them evil or inappropriate?
A No, but it's possible they'll save on co-tenancy issues that would have to, if they didn't put a department store there. And that could be significant.
Q But we know that Transform Co. cannot afford to put an anchor tenant in there because the rent would be so low, they couldn't make any money on it. Isn't that right?
A Well, we don't have to put an anchor tenant in there.
Q Well, you can't afford to.
MR. MARTIN: Your Honor, objection. Assumes facts not in evidence and it's asking for financial --
THE COURT: No, I know -- differently, is it your -- based on your experience, Mr. Puerto, would, quote, "an anchor tenant" only be likely to agree to a long-term sublease of this space at issue if it paid de minimis rent?
MR. PUERTO: If an anchor tenant was not going to pay rent here and there was the demand to put the anchor tenant there, it would likely go there because it's a great property, great mall.
THE COURT: No, I'm saying something differently.

MR. PUERTO: Sorry, can you rephrase the question, then?

THE COURT: Obviously, if you offered de minimis rent, that would be attractive. But if you were, instead, offering a substantial rent. I don't even know what that would be, but a substantial rent --

MR. PUERTO: Right, right, I understand.

THE COURT: -- is it conceivable that any anchor tenant would take that deal?

MR. PUERTO: If you were to put a significant amount of capital into it to support the rent. I mean, it's -- it, again, comes down to the real estate, the quality, where it's located, for an anchor to make a decision to be there. There's not that many anchors today that are taking 177,000sf. You know, the highest and best use for this real estate is probably not an anchor. For them, it could be, but for us, it likely would not be, because we look for tenants that would pay higher rents.

THE COURT: Okay. I phrased that question as I thought you were asking it, but you can go ahead.

MR. FLYNN: No, that's...

Q So, Transform Co. would like to reap the benefits of the equity in this lease by getting highest rents as possible and keep the difference. Is that right?

A It's -- if we wanted to maximize value in the real

estate, that would be the process to undertake.
Q If there was an anchor tenant available for de minimis rent, that'd be an excellent fit for the mall, you wouldn't agree to that, would you?
A Not if it didn't maximize the value of the real estate.
Q Yeah, right. So, you're interested, primarily, in getting money. Not necessarily the mall, as I think it was concluded.
A Can you rephrase that? Sorry.
MR. FLYNN: Never mind. I have no further questions, Your Honor.
THE COURT: Okay. Any redirect?
MR. MARTIN: No, Your Honor.
THE COURT: Okay. You can step down.
MR. PUERTO: Thank you.
MR. CHESLEY: That would conclude Transform's evidence, Your Honor.
THE COURT: Okay. And obviously, I have the agreed exhibit --
MR. CHESLEY: Agreed exhibits which have been admitted and stipulated as fact. Yes, Your Honor.
THE COURT: Okay. You may proceed with your witnesses.
MR. FLYNN: Your Honor, we'd like to move, at this time, under Rule 52, for partial findings against the

Plaintiff -- against the Debtor. They have failed in their burden of proof; which they admit they have to prove adequate assurance of future financial ability and adequate assurance of future performance. They -- performance means not financial performance, it means operational performance. Is the tenant able to drive tenants to the mall? Do they have a substantial advertising budget? Do they -- and this is all cited in the cases, which I'm sure you could read or are well aware of.

THE COURT: Actually, I have not seen that cited in a case, so I'd like you to cite them to me.

MR. FLYNN: Can I have the brief? Well, I will cite those. I will -- we have filed a brief with the Court, which has these cases in there.

THE COURT: Well, then you better cite me to the specific provisions in the cases, because I didn't see that.

MR. FLYNN: Well, all right.

MAN: You don't have to do it now.

MR. FLYNN: All right. There are a number of cases that we've cited, and I can go quickly through them, including the Third Circuit, which requires adequate -- that performance drive -- to do a number of things to aid or fit in with the harmony of the mall and the tenant mix. They have given no evidence that they're able to comply with what's required for tenant mix. They've given not -- that

is a requirement under the code. They are required to show operating performance equal to -- similar to that Sears at the time they entered into the lease. We went into that extensively in our briefs, operating performance, and they have presented no operating performance because they don't intend to operate. They're going to try to find somebody to operate, and all we can do is speculate on what operation performance might be in the future.

However, I see nothing in the code that says they can prove that at a future date. They have to prove today what the operating performance will be. They can do certain things at a future date. If they are dark, they get some reasonable time to reopen. But they can't come into court today and say, don't worry about operating performance or tenant mix. We'll fix that later. And those are rights in addition to the rights under any lease, because they don't refer to the -- they're required to be in a lease or (indiscernible).

THE COURT: You're aware that there are several cases in this District that disagree with that latter proposition, including in re Ames Department Stores, 127 B.R. 744, (Bk. SDNY 1991)?

MR. FLYNN: I'm aware that there's a mix in case law on this, but there's no -- the operating performance is a requirement of the code, and they presented nothing, and

cannot present anything because they're not going to operate. It's not something. They presented nothing. They have nothing to present. They don't have a tenant to go in there. They just say, let us rent it and trust us. We'll do this -- we'll fix -- don't worry, it'll be okay. We have no evidence of anything. They are required to show, first of all, they gave us the Reicher declaration, which had exhibits. We only got the exhibits, and the exhibits given to us for adequate assurance state right on them that they can't be relied upon for any reason and cannot be used for assurance of anything. That word is used.

They simply have no current -- it's unbelievable to me that they can't provide financial information, which is adequate, appropriate, and makes some sense. They have -- we read that; we can't even believe it. What are we supposed to -- what are we supposed to be assured about? We are the opposite of assured. The Reicher himself said if they don't sign all these leases, they're going to go out of business. We don't know the status of the business or what happened to the assignments.

THE COURT: Do you dispute that, in addition to the $10 a month rent, the aggregate amount payable under the lease, with a reasonable estimate for the taxes, is approximately $1.1m to $1.2m a year?

MR. FLYNN: Yes, we do. That's approximately

correct. That's correct.

THE COURT: I'm sorry, you do dispute that or you do --

MR. FLYNN: We do agree with that.

THE COURT: Okay.

MR. FLYNN: And, just a minute here, Your Honor. So, we don't know how -- and if the Court wants to rule that they don't have to be equal to or similar to Sears, our position is, they haven't come close -- they haven't really proven anything. They have no adequate, reasonable, appropriate financial evidence. They have no evidence at all about operations of any kind, and in fact, specifically state they're not going to operate and may not have to -- in their briefs and in their declarations, for as much as two years, this thing will be dark, and they can do anything they want. We can go through all the provisions in the code. There's many others that weren't -- but have been submitted in the exhibits, that limit their ability on what they can do with that property, even under the lease.

There's many others that weren't -- but have been submitted in the exhibits, that limit their ability on what they can do with that property, even under the lease. But in any case, they haven't come close to meeting the burden of proof that gives adequate assurance of future financial performance and operating.

THE COURT: Under the lease, do they have to operate a store?

MR. FLYNN: Yes. I think they do, but they might have time.

THE COURT: And what provision -- I'll read it at -- obviously, the lease incorporates the REA. What provision are you relying on for that?

MR. FLYNN: I'm going to let my partner, Mr. Beeby, kind of go through the lease provisions and the REA provisions if the Court has questions about those.

THE COURT: Okay.

MR. BEEBY: Good morning, Your Honor. My name is Alex Beeby. I'm also at Larkin Hoffman. With regard to remaining dark, and I'm sure you've read all of the pleadings, and there is reference to the idea that the Sears space can go dark in the REA, which is true: it can go dark. But the REA does not necessarily permit the space to stay dark. With regard to the provision that allows the space to go dark, and let's see here, I believe it's Page 143 of the REA, which is Section 25(d)4, explicitly says that: "At all times," which, just to put it into context, it says: "After the major operating period of Sears," this is after the initial 15 years, "Sears shall have the right without developer's consent but at all times subject to the applicable provisions of Article 22 hereof to vacate the

lease," and then it goes onto the 50 million aspect, which I'm sure will come up later.

If we turn back to Article 22, that is specifically incorporated into that provision, I believe it is on -- let's see, here. Let me find the exact page, here. That section starts, 22(c), starts on Page 123 of the REA. And then on 126, which was referenced previously on the stand, it requires that the use be not -- this is where the section comes up, for any use or purpose -- "shall not be used for any purpose other than retail purposes customarily found in a closed mall shopping center, and non-retail activities customary incidental thereto, or such use and purposes that are not compatible and consistent with, and are not detrimental, injurious, or inimical to the operation of a first-class regional shopping center on each of the three levels thereof."

While the REA does permit, at least temporary, going dark, at some point, it's going to run into, within a reasonable period of time, it's going to run into violating this other provision that is explicitly incorporated into Provision 25 of the -- or Article 25 of the REA and become detrimental, injurious, and inimical to the operation of a first-class shopping center.

THE COURT: Okay, but that says that Sears and its successors and assigns, right, it's not just Sears,

"successors and assigns, shall not use the Sears building or Sears tract for any use or purpose other than retail purposes customarily found in and enclosed mall," and then with the proviso, and then, in the language, "and are not detrimental, injurious, or inimical to the operation of a first-class regional shopping center," which precedes the proviso. So, then you go back to my question. Sears doesn't -- you don't have to have a Sears store there. You don't have to operate a Sears store there. There has to be, subject to the going dark right, which is -- you argue there's some time limitation on it, although it doesn't specify that, it just -- it gives the landlord two years to exercise an option.

MR. BEEBY: With regard to the third floor, yes, correct.

THE COURT: Right, right. And then there's this proviso that the assigns and/or Sears shall not use the building other than for retail purposes, you know, as you just read.

MR. BEEBY: Right, right. Yep, exactly. And that Section 9(d), which is that harmony provision, talks about that. that is a further definition or explanation of what inimical -- what types of uses would be inimical, and then there's a whole list of actually explicitly excluded uses as well.

THE COURT: Right. That's the one that excludes --

MR. BEEBY: Well, above it in Section C -- this is Page 55 of the REA.

THE COURT: Right.

MR. BEEBY: Above it, it explicitly prohibits uses for and office building, and then down below, it prohibits, yeah, mobile home, trailer court park, auto body shop, pet shops, that kind of stuff.

THE COURT: Right.

MR. BEEBY: Yup.

THE COURT: But there's no provision, for example, that says that there has to be an anchor store.

MR. BEEBY: Well, you know, I think that does actually come into play, here.

THE COURT: Okay.

MR. BEEBY: When you look at the aspect of what is harmonious to the operation of a first-class shopping center and what's going to impact the rest of the building, that Section 22(a) puts into context that this space is being envisioned as a department store, and then there are provisions within --

THE COURT: Does it? Where does it say that? (indiscernible) sophisticated partners (indiscernible).

MR. BEEBY: Yeah, Section 22(a), which is on Page

15, Covenance of Majors. It talks about the parties agree that it is in their mutual best interest the stores of the majors be developed and maintained as department stores, and this is key: “as an integral part of the shopping center to permit the shopping center to contain a combination of occupants which represent a sound and balanced diversification of merchandise.”

THE COURT: But can you -- all right.

MR. BEEBY: And at this point, I’m restricting myself, I should say, to what is on the record at this point because we’re dealing with a motion on partial findings.

THE COURT: Right. But A is followed by B and C, which deal with the specific anchor stores.

MR. BEEBY: Yes, you’re correct, Your Honor. And it provides the context.

THE COURT: These are four very sophisticated parties. I would have thought that if the intention of C was that an anchor store always be maintained, notwithstanding the right to assign or sublet, they would have said that.

MR. BEEBY: Well, Your Honor, there’s also other provisions that come into play that would, absent the bankruptcy-type setting, in which -- which, under the bankruptcy-type setting, as the -- Transform has argued would be a prohibition on assignments, but there are other

provisions that could, absent this scenario, be used to acquire that property back, if it was being held dark.

THE COURT: Oh, acquire it back, yes.

MR. BEEBY: Right.

THE COURT: I understand that. (indiscernible).

MR. BEEBY: Right, and then be able to maintain that control.

THE COURT: But I actually read -- this is a question for Transform's counsel. I actually read Transform, in one of its pleadings, stating that it is prepared to live with the buyback option.

MR. CHESLEY: Correct, Your Honor. We will abide by it.

THE COURT: I mean, there are -- you're right, there are cases that say that buyback options are invalidated by 365, but I think they've said they won't press that point.

MR. BEEBY: And I would have to defer to -- with regard to that...

THE COURT: Okay. All right.

MR. CHESLEY: Your Honor --

THE COURT: I don't think counsel's finished. I think he just was --

MR. CHESLEY: Okay, I'm sorry. I thought we were done.

THE COURT: -- referring to his colleague to walk me through the lease and the REA.

MR. FLYNN: I would argue, too, for what it's worth, is the decode itself in I think a number of the cases, and we'll cite them, do not -- it doesn't say what's in the lease. It doesn't say or require that it be protected by their lease. It's an additional requirement put in by Congress, if you intend to use Chapter 11, to get these transactions done this way. And they have chosen Chapter 11 to get these transactions done this way. They are bound by the strict, reasonable readings of the law. And whether or not it's in a lease, they are required to show that they have adequate financial wherewithal and a plan that makes some sense, and performance. And they simply can't do it, because there's nobody to be put in there at this point and they don't know what will happen.

THE COURT: Well, if the lease lets them operate in a specific way, you're saying nevertheless, the Court should provide some other gloss on operation?

MR. FLYNN: Yes, and the thinking of that --

THE COURT: Yeah? Do you have any case that takes that view?

MR. FLYNN: Yeah, there's a number of them, but they say --

THE COURT: Okay, I just -- I'd be happy to be

cited to one.

MR. FLYNN: All right, yes, Your Honor. I have it marked up here on our brief.

THE COURT: Okay.

MR. FLYNN: The Casual Male, 120 B.R. 264 is one. They require In Re Rikel, which was cited often, involved a lease that allowed it to go dark. I have the cite here, but -- and the Court said, we're going to make you open within six month, and you have to have a tenant that the landlord will agree to.

THE COURT: That's how you read Rikel?

MR. FLYNN: Yes, I do.

THE COURT: All right. Okay.

MR. FLYNN: Yes, I do. In fact --

THE COURT: So it's just the cases you cited in your brief, no other cases for me?

MR. FLYNN: I think there are other cases. We could come up with more, but that's a good start. And there's a Third Circuit case and -- so, yeah.

THE COURT: Okay.

MR. FLYNN: And others cited. And Rikel, yeah, involved a landlord that, the premises go dark, and the code -- they sit under the -- because we think in the legislative history, which we also supply to the Court, we have some (indiscernible) cases in state that because landlords,

they're taking rights away from them, special provisions have been made for shopping centers to give them rights back that they might not otherwise have, and it doesn't refer to anything in a lease or protecting --

THE COURT: Well, it does refer to the benefit of the bargain, which one assumes is the contract they entered into. That's what the legislative history refers to.

MR. FLYNN: Well, yeah, and it also refers to destroying malls with improper mix of clients, destroying -- they -- no evidence of proper mix, and no evidence of anything under -- they simply said, here's some financials that aren't very worthy right on their face. And then they say, don't worry, we'll get a tenant. Don't worry, it will all work. They have failed to date to meet their burden of proof.

The cases are worried about whether or not a tenant that they're proposing will be put into bankruptcy or not have -- the tenant will go bankrupt. We have no idea who the tenant's going to be, so we have no idea if the tenant is going to have actual financial wherewithal. Because the damage is not that Transform necessarily go bankrupt, but whoever they put in would go bankrupt.

THE COURT: Well --

MR. FLYNN: They've kind of jumped the rail because they're not doing it the normal way. They're taking

the assignment of it first and then saying, don't worry, we'll get a real tenant later. And so, when it's good for them to say, you know, we're the tenant, they say that, and they say, when it's not good for them, they say well, it's this other person that we're going to get in the future. Don't worry about it. And so, which is it?

We are concerned about the tenant, we are concerned there is no tenant, we are -- if it's going to operate or do anything there. We are concerned about the tenant's ability to pay their rent, to go bankrupt, to do a high-class job, to be -- we're concerned about all of that. That's fine. They have presented no evidence of what they intend to do, except they say there's a lot of things we could do, pretty much when and if we want.

THE COURT: Is there a limitation in the lease on the financial wherewithal of a prospective S&E or subtenant?

MR. FLYNN: I don't know. There's a -- I don't believe there is. However, however, the code does require that.

THE COURT: Well, and then I suppose -- I mean, maybe I'm anticipating Transform's argument, but they will say, I believe, that MOAC can rely on the restriction in Paragraph 22C that it be consistent and compatible with the operation of the first-class regional shopping center. I'm assuming that would include that if someone purports to be a

first-class operator, or an operator whose store would be consistent for a first-class shopping center, that would include some financial wherewithal.

MR. FLYNN: Yes, yes. And, but the point is, we don't know who that is today.

THE COURT: Well, no, but if they provide it, then you could say, no, these people aren't -- they're not consistent with the operation of a first-class shopping center.

MR. FLYNN: That's true, except I see nothing, and our position would be that there's nothing in the code that allows them to show (indiscernible) to that in the future. They are required to show that today --

THE COURT: Well, they're required under the lease to show you in the future -- they would be.

MR. FLYNN: There are many requirements in the future under the lease.

THE COURT: Right.

MR. FLYNN: I'm referring to the code, and the code doesn't say, don't worry about it, you can show later whether they'll be adequate, there will be a proper mix. Don't worry about it.

THE COURT: Okay.

MR. FLYNN: We'll leave that go.

THE COURT: All right, but that just comes back to

the issue as to whether 365(b)(3) requires the Court to determine, separate and apart from the contract, pursuant to which adequate assurance of performance has to be shown -- or under which adequate assurance of future performance has to be shown, i.e. that contract, that you have to look into, generally, issues as to what makes up a proper mix or balance in a shopping center, for example.

MR. FLYNN: Well, and you've got to do that today, and --

THE COURT: Well, that's where we have a dispute, I guess.

MR. FLYNN: Okay.

THE COURT: Again, I have yet to see a case that says that, and I've seen several that go the other way.

MR. FLYNN: So there are many cases that say that you have to show how the tenant will drive customers to the mall.

THE COURT: Show me one.

MR. FLYNN: I'll quote from it.

THE COURT: Okay.

MR. FLYNN: Just a minute, Your Honor. One of the leading cases -- I apologize, Your Honor.

THE COURT: Okay.

MR. FLYNN: In Re Joshua Slocum, that's a 922 F.2d 1801, (Third Circuit 1990), Congress in 1978, and again in

'84, placed additional restrictions on assignment of shopping center leases in order to protect the rights of lessors and -- and here's the key phrase -- the center's tenants. And then it says, Congress -- and it doesn't say, unless they (indiscernible) or didn't in the lease. Congress recognized that -- of the unusual situation where a lease assignment affects not only the lessor, but an assignment shopping center to lease to an outside party can have significant detrimental impact on others. Okay? So we don't know what the impact will be unless we know --

THE COURT: I read Joshua Slocum.

MR. FLYNN: Okay.

THE COURT: The issue that we're discussing is not dealt with in Joshua Slocum. Those are general statements of the purpose of the law.

MR. FLYNN: Okay. All right, Your Honor. And, again, In Re Rikel, it says specifically that even though there's no -- there's a go dark -- they're allowed to go dark, they should -- they have to reopen within a reasonable time and required them to do so within six months.

THE COURT: But there was a specific prohibition in the lease in Rikel about going dark.

MR. FLYNN: Right. Right.

THE COURT: So, again, the issue (indiscernible) there as to whether 365(b)(3) imposes conditions on the

parties that they didn't already bargain for.

MR. FLYNN: In Rikel, I believe it had -- the tenant had the right to go dark and the Court there specifically said, you've got to open up. I'm sure that that's the case. It specifically said that. And in fact, it's been acknowledged by the other side, and they've offered to open up within two years in their pleadings.

Again, Casual Male states, and I quote, "The assignee should have similar operating and financial performance when all factors, including advertising, aggressiveness, profit margins, growth potential, and other indicia are weighed." It doesn't say, just look at can they pay the rent. We don't protect tenants when we just say, well, all they got to do is pay the rent, and that's what Congress was intending to protect. And I believe -- I believe -- the Third Circuit has also agreed to that.

But they also concerned in -- about whether or not a tenant will go bankrupt in the space again, and that would be inimical to the mall and cause -- and that's under the Bankruptcy Code. They require that you show that the tenant not be likely to go bankrupt, the one operating there. If there's another bankruptcy of that tenant, we are going to be in trouble again. We have no evidence of what they intend to do and what tenant they have. They have none. They're allowed to just skip by all that and just say, don't

worry, we'll get you -- and just go by your lease. We have rights today that we would like to enforce, and we think they're bound to comply with those rights.

THE COURT: Okay.

MR. FLYNN: Thank you, Your Honor.

MR. CHESLEY: Your Honor, may I have just one moment to confer with my client?

THE COURT: Sure.

MR. CHESLEY: Thank you. Thank you, Your Honor, for the courtesy. Your Honor, may I propose that, to make this even more efficient, we are happy to take their three declarations without cross and go right to argument. That way, I can argue against the motion to dismiss on the pleadings, as well as put our substantive argument before the Court. At this point, there's nothing that additional cross from those three witnesses will add to the Court's deliberation.

THE COURT: Okay.

MR. CHESLEY: Thank you, Your Honor.

THE COURT: So let me just --

MR. CHESLEY: Yes.

THE COURT: I think what I would like to do before you do that, though, is the following. I have the declarations by Mr. Frillman, Mr. Ghermezian, G-H-E-R-M-E-Z-I-A-N, Mr. Hoge, H-O-G-E. Are each of those gentlemen here,

present?

MAN 2: Yes, Your Honor.

MAN 3: Yes, Your Honor.

THE COURT: Okay. So, you can sit down. I'm not going to put each of you on the stand and go through what I did to introduce each of the Debtor's -- Transform's two witnesses, but I want you to consider that you're under oath when I ask you all three of these questions.

Each of you has submitted a declaration on behalf of MOAC in this proceeding, and I have them in the exhibit book. They were submitted as your direct testimony in this proceeding. Being here today, would that continue to be your direct testimony? And, if not, is there anything that you would like to change in the declarations?

MR. FRILLMAN: No.

THE COURT: No for Mr. --

MR. FRILLMAN: Frillman.

THE COURT: -- Frillman, so your direct is testimony not going to change.

MR. HOGE: Mr. Hoge.

THE COURT: Mr. Hoge, I'm sorry, I mispronounced your name.

MR. HOGE: That's okay.

THE COURT: Same answer?

MR. HOGE: Same answer.

THE COURT: Mr. Ghermezian?

MR. GHERMEZIAN: I'd like to explain, and I'd like to add to what I've submitted.

THE COURT: You'd like to add something to it?

MR. GHERMEZIAN: Yes.

THE COURT: Okay.

MR. GHERMEZIAN: I want to explain (indiscernible).

THE COURT: Are there -- do you want to talk to him first, before he does that? This is not a correction? This is just an addition?

MR. GHERMEZIAN: (indiscernible) more explain (indiscernible) more (indiscernible).

THE COURT: Do you want to have him supplement it?

MR. FLYNN: Yes, Your Honor.

THE COURT: Okay, so can you take the stand, sir? Okay, I know I essentially did this already for you, but I'm going to ask you to raise your right hand and I'm going to put you under oath. Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. GHERMEZIAN: I do affirm, yes.

THE COURT: And it's Raphael G-H-E-R-M-E-Z-I-A-N?

MR. GHERMEZIAN: That's correct.

THE COURT: Okay, so do you want to ask him -- I

understand, Mr. Ghermezian, that you wish to add to or supplement your declaration that's otherwise serving as your direct testimony?

MR. GHERMEZIAN: That's right.

THE COURT: Okay.

DIRECT EXAMINATION OF RAPHAEL GHERMEZIAN

BY MR. FLYNN:

Q Okay, Mr. Ghermezian, how would you like to supplement that, please? Go ahead.

A I just want to explain, Your Honor, there is a misunderstanding here.

THE COURT: You have to speak a little louder, sir.

A This is clear now?

Q Yes.

A I just want it clear that there is big misunderstanding here. The misunderstanding is that Mall of America is not the shopping center. It is not (indiscernible) usual or --

THE COURT: If you're basing it on my language, shopping center is the term that Congress uses in the Bankruptcy Code. I appreciate that it's not an A&P or a, you know, shopping center like that. I appreciate that it has its own characteristics. I'm just using that term because that's the term Congress uses generically, and the parties have all agreed that it fits within that term.

A Yeah, just please, you know, let me go ahead and explain. First of all, Mall of America is not a shopping center. It's a tourist attraction. It draws -- Time Magazine took a survey and explained and recorded that Mall of America, there was more tourists (indiscernible) than Disneyland, Epcot, and Grand Canyon combined. The Mall of America is a golden goose of Minnesota. It lays golden eggs of $3 billion annually for Minnesota, hires 13,000 people -- 13,000 people. It's -- I believe it is a huge asset of Minnesota and the city that we are in. If it fails, if it fails, it would be a big loss to the state is what I think the Court should consider.

Let me explain. When we made this deal with Sears Corporation, it was a huge corporation. It was never anticipated that one day, they were going to go bankrupt and some scavengers are coming there and (indiscernible). I'm just going to make the best money I want only. What I'm trying to impress upon Your Honor is that the word appropriate and the word -- what was the other they used, appropriate and customary -- in this case is not -- is different. It has to be specific to this project. What is appropriate and customary for this project is that if Sears does not operate as a department store, or if it does not operate, it's closed door, it actually is right, actually right, to a number of tenants, to terminate a lease.

Now, when these tenants, when these tenants today, the retail situation in the country is very, very precarious. It's very sensitive, and if tenants go, they go under certain percentage, under 80 percent, which is very likely to happen, as a result of that, almost every other tenant in the project can leave.

Now, today, they may not leave that fast, but this gives them an excuse to leave. If the tenant leaves, the shopping center is finished. And, believe me, it's not inconceivable. They are leasing today (indiscernible). They location where Sears today is, is at the end of two malls. On every corner similar to that, you have to have (indiscernible) a department store. City of Bloomington is spending $270 million of their own money to build a project attached to the mall. If this mall fails, and believe me, what happens to Sears can actually bring the mall down to nothing. This is not an exaggeration; it is real. It's true, this can happen.

I think in this situation, you should (indiscernible) a special interpretation for appropriate and customary in this case. Appropriate and customary in this case is only (indiscernible). I think they should -- if you are not going to disallow the assignment, and if you're going to let them have the assignment, I think you should have a limited time as to when they have to lease this, and it has to be

limited to department stores, because if we don't have a department store, the mall could go down, because this is the term in many of the leases.

Also, I think we should have an absolute right in this case of approving (indiscernible). Now, this really is not only to add --

THE COURT: So I'm going to cut you off, because you're really just giving me legal argument at this point.

MR. GHERMEZIAN: I know.

THE COURT: Okay. Do you wish to cross-examine?

MR. CHESLEY: I'm sorry, Your Honor, I think I have to just on a couple points.

THE COURT: Okay.

CROSS EXAMINATION OF RAPHAEL GHERMEZIAN

BY MR. CHESLEY:

Q Just briefly, Mr. Ghermezian -- actually, good afternoon. Quickly, with respect to department stores in the mall, am I correct there was a Bloomingdale's in the mall that closed in 2012?

A Yes. We had four department stores, but our contractual obligation to the tenants was only three. So Bloomingdale's didn't have any effect, but Sears will actually bring the mall down.

Q Thank you, I'll -- let me -- if you could just answer my question, I would appreciate it. There was a

Bloomingdale's in the mall that closed in 2012, correct?
A Yes.
Q And that was replaced by a combination of several different stores, correct?
A Yeah, because we had no obligation to have four department stores, only three department stores.
Q To answer my question, the Bloomingdale's space was carved up into several different new tenants, correct?
A That's correct.
Q Including the Crayola Experience, correct?
A Yes.
Q And the Bloomingdale's store closed in 2012, correct?
A Yes.
Q And that space was finally fully sublet by 2016, May of that year, correct?
A I don't believe. I think we gradually leased this space.
Q When did the Crayola Experience open?
A I don't know, I think like a couple years ago.
Q Okay. Now, you described this Sears location at the end of two courts. That's a valuable store location, isn't it?
A It's not a valuable store location. It's an important position for the mall because every leg of the mall survives by the anchor that is anchoring those legs. Now, Sears is

anchoring two legs of the mall, and if Sears goes dark and stays dark long, or -- that's why we said that whatever you're doing that lease, it cannot be injurious to us, and it cannot harm us. This will harm completely. Really, really, I'm telling you, there is the chance of better than 80 percent that (indiscernible) if Sears brings tenants other than department store or goes dark and stays dark for a long time.

Q You want the location back, don't you?

A I want the location back because I (indiscernible) department store there.

Q In fact, you're in negotiation with a department store to take this space, aren't you?

A Pardon?

Q Aren't you in negotiations with another department store to take the space?

A Yes.

Q And, Mr. Ghermezian, am I right? In your declaration, you refer to that there were many tenant leases at the mall that require that a department store be operated in the Sears space, correct?

A Yes, that is --

Q Those are called co-tenancy clauses, aren't they?

A I believe (indiscernible), yes. We have to have the department store, or else they can terminate their lease.

And today, because of (indiscernible), the chances are very high that we would get (indiscernible).

Q So in fact, that will impact you, the landlord, if there is not a department store operating in the Sears location, correct?

A Not just the landlord, the project itself, the viability of the whole project.

Q Well, there are tenants that can either cut their lease payments or cancel their leases if in fact there isn't a department store in there, correct?

A They can tell me they leave, yeah.

Q Yeah. Sears isn't party to any of those co-tenancy provisions, are they?

A What happens in Sears cannot be injurious, it says in the lease, cannot be injurious to the mall and cannot -- it has to be compatible. It has (indiscernible) with the other tenants. So the only thing that will be compatible and will not injure the mall is going to be a department store, and there are lots of department stores. You can have Sacks, you can Neiman Marcus, you can have Bloomingdale would still today come back, because they have had the situation, the tenants left and they come back 10 years later. Today, the situation in Minnesota (indiscernible) that. You can have Bealls, you can have (indiscernible), you can have -- I can give you a list of 10 department stores. And, believe me,

we can make a deal with one of them. I can make a deal for you, and it can have all the benefit (indiscernible). (indiscernible) yours, but they have to -- whatever cost there is involved, you have to share with us (indiscernible) the cost.

MR. CHESLEY: Your Honor, I'd like to move to strike that answer as simply not responsive to the question.

MR. GHERMEZIAN: What was the question?

THE COURT: I won't do that. That's --

MR. FLYNN: Thank you, Your Honor.

Q Just so I'm clear, you do not want any of these other tenants to invoke their co-tenancy provisions.

A That's right. That's the argument.

Q Thank you. Nothing further.

RE-DIRECT EXAMINATION OF RAPHAEL GHERMEZIAN

BY MR. FLYNN:

Q Are there available anchor tenants that go into that space? Are they available?

A Yes.

Q Okay. Are the anchor tenants generally -- would that be best for the space and best for the mix of the mall?

A That is not just best. I think that it absolutely essential for the mall because it's in an anchor position, and tenants in both legs that leased this position, they are dependent on who is in there (indiscernible) anchor tenant.

And we have an obligation to tenants in the mall, in writing, that this -- that we have to have three department stores. That's why, when Bloomingdale's left, we didn't care, because the obligation was only three.

Q Right. Are you willing to rent to an anchor tenant for very low rent, and even possibly pay an anchor tenant to come to the mall?

A Basically, I'm willing to lease to an anchor tenant for no money, no rent, nothing. And (indiscernible), I mean, to the extent I'm prepared to actually pay a tenant and guarantee them that they make a profit. In other words, if they lose, I pay them money every year for the rest of the lease to just (indiscernible) yeah.

Q And is that the current market for anchor tenants? Is that pretty much what you have?

A Yes, (indiscernible) sign anchor tenants, they will actually guarantee -- guarantee -- that they're going to make a $4 to $8 million profit every year. In other words, if they don't make that, it have to come out of our pocket. And they're negotiating now that a tenant (indiscernible) also guaranteed them that they're going to make profit, and they're only giving us a percentage (indiscernible).

Q All right. Thank you. Anything further?

A No.

Q Thank you.

THE COURT: Okay, you can step down, sir. Okay, so --

MR. FLYNN: Excuse me, Your Honor? May I talk to my witnesses? We may want to address issues that were brought up that aren't in their declarations.

MR. CHESLEY: I would object to that, Your Honor, on -- and I don't want to be too technical here, but their direct was on. I did not cross. We gave Mr. Ghermezian the benefit of the doubt there, which maybe we shouldn't have, but we did. But to now allow an additional direct, when we've decided no need to cross, I think is actually improper.

THE COURT: Well, you're saying you're putting them on in rebuttal?

MR. FLYNN: They brought up issues and made --

THE COURT: I'm just asking if you'd put them on in rebuttal.

MR. FLYNN: I'm putting on my case. I'm putting them on in my case.

THE COURT: No, no, that's a different story.

MR. FLYNN: All right.

THE COURT: I would let you put them on in rebuttal to, you know, the statements that were made on cross by the Transform witness.

MR. FLYNN: Yes, Your Honor, essentially that's

correct. It is correct.

THE COURT: We got into this position because Mr. Chesley wanted to cut through to final argument on this, rather than having two oral arguments. I guess I'll have to give you my ruling on your motion based on the Debtor's pleading then, unless you want to just defer that to the end.

MR. FLYNN: Yes, Your Honor, we will defer to the end.

THE COURT: Okay. All right. Very well. So you can put them on in rebuttal, or some -- you don't have to put them all on, whoever you want to put on in rebuttal.

MR. FLYNN: Mr. Frillman?

THE COURT: Please sit down. I'll swear you in, even though you're probably already viewing yourself as sworn in. Would you raise your right hand, please? Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. FRILLMAN: I do.

THE COURT: And it's F-R-I-L-L-M-A-N?

MR. FRILLMAN: Yes, sir.

THE COURT: Louis Frillman.

MR. FRILLMAN: Yes, sir.

THE COURT: Okay.

DIRECT EXAMINATION OF LOUIS FRILLMAN

BY MR. FLYNN:
Q Well, Mr. Frillman, you were in the Court this morning when testimony was given by the Transform (indiscernible), is that correct?
A Yes, sir.
Q Did anything that you heard from them change your mind about your opinion?
A No.
Q Did they raise any issues not addressed in your declaration that you'd like to elaborate on?
MR. CHESLEY: Your Honor, I'm going to object. This is not rebuttal, Your Honor, with all due respect.
MR. FLYNN: He's going to discuss issues not raised in his declaration, brought up this morning. That's rebuttal.
THE COURT: Well, you can answer the question. I may cut you off, depending on what you're saying, okay?
A Can you repeat, sir?
Q Did you hear anything this morning that was said in the testimony that was not addressed in your declaration, either at all or sufficiently, that you would like to comment further on?
A Yes.
Q What areas would that be?
MR. CHESLEY: Same objection, Your Honor.

THE COURT: Well, let me hear the answer first.

A There's a -- somebody said the word confusion or misunderstanding, Mr. Ghermezian, I think. The documents that have been presented to the Court and that we reviewed as a part of this process are a presentation of the so-called financial condition of the operating entity known as Transform or Transform Co, which is going to hold assets that have evolved out of the Sears bankruptcy. And that means stores, 425, which I guess is now reduced to about 400, operating stores doing something with the Sears brand name and trademark, and that's posited as the, you know, as the underlying argument to allow this process to go forward.

THE COURT: I'm sorry, this is not rebuttal. I don't know where you're going, but this is something, frankly, that is legal argument. It mischaracterizes the direct testimony, and I'm going to not allow it. This is ridiculous, honestly.

MR. FLYNN: Is there --

THE COURT: The direct testimony was that they were a real estate company, and that's what your Counsel is relying on in saying that this motion shouldn't be granted. There was no testimony about the 425 stores, or anything like that, that wasn't something that you could have addressed in your declaration.

So, just, enough. Is there anything else you want

to address, besides that point?

MR. FRILLMAN: Whatever else I'd have to say evolves from that, because that was a part of the financial statements that were presented.

THE COURT: All right, fine. You can step down.

MR. FLYNN: May I talk to Mr. Hoge before I decide what I'm going to --

THE COURT: Sure.

MR. FLYNN: (indiscernible), Your Honor.

THE COURT: Okay, fine, thank you. All right, would anyone benefit from a five-minute break?

MR. CHESLEY: I probably would, Your Honor.

THE COURT: All right, so I'll be back at -- let's make it 10.

MR. CHESLEY: Thank you, Your Honor, and we should be brief. Thank you.

(Recess)

THE COURT: Please be seated. Okay, we're back on the record in In Re Sears Holdings Corp.

MR. CHESLEY: Thank you, Your Honor. Apologize; it's just a little bit easier to use it from the lectern.

THE COURT: Sure.

MR. CHESLEY: Your Honor, at this point, we would provide a very brief closing, as well as address the motion for judgement on the pleadings that was brought by the

landlord's Counsel.

Through the actual motion, Your Honor, the Debtors are seeking authority to assume and assign the lease for the Mall of America store, to transform Leaseco, the wholly owned subsidiary of Transform Holdco, the acquirer or the majority of the Debtor's assets, pursuant to the global sales transaction.

Before going on, Your Honor, I think it's important to clarify a point that was made repeatedly by Counsel for the landlord, and that related to the Reiker declaration and statement with respect to what will occur if the leases are not assumed and assigned to Transform. I think as the Court is aware, that obviously were the assets that were acquired, and of course that was a critical part of the bargain and, as the evidence has made clear, all but three of those leases have now been assumed and assigned to Transform.

The landlord, Your Honor, has strenuously objected on multiple occasions to the assignment to Transform, with a variety of arguments. But most critically, what they're attempting to do is to rewrite the lease to what they wanted the lease and the REA to provide when Sears constructed this store on its own nickel in 1991. The reading of this lease and the leading of the REA, Your Honor, we believe authorized the assumption of the lease, pursuant to Section

365(b)(3), and I am going to articulate why we believe we've met those standards.

First of all, the arguments that are advanced by Mall of America ignore two fundamental precepts. First, 365(b)(3) is not a standard to be viewed in the abstract. The provisions words, the Third Circuit noted, in In Re Joshua Slocum, craft it as a shield to remedy three problems caused by shopping centers and their solvent tenants, by the administration of the bankruptcy estate. First was the hardship caused by vacancy or partial occupancy? Second was uncertainty of whether the landlord will continue to receive rent, and third, disruption to tenant mix in the shopping center.

The provisions were not, however, drafted as a (indiscernible) for landlords to defeat the assumption and assignment of the lease to a new entity, or unilaterally veto or claim a veto right on an assumption and an assignment that fully complies with a lease in the Bankruptcy Code. And what is critical to the issues before the Court today is that Section 365(b)(3) is, again, not an abstract standard. Rather, as the Court noted in In Re Ames Department Store, 127 B.R. at 752, the legislative history of 365(b)(3), "makes clear that the provision was designed to ensure that the lessor and other tenants maintain the benefit of the original bargain with the Debtor." As the

Court also made clear in Ames, the Court's analysis under 365(b)(3) must be focused on the parties' contractual undertakings, not general notions of assignability and tenant mix.

Transform is only seeking today, Your Honor, to obtain the benefit of the bargain that Sears entered into in 1991. Now, again, the legislative history underlying 365(b)(3) makes clear that the enhanced statutory protections are not intended to block a new purchaser from acquiring the leasehold, but rather, looks squarely at the economic viability of the assignee. As the Court in Service Merchandise confirmed adequate assurances to be evaluated, "on a commercially reasonable standard based upon the information available at the time."

To that end, the mall's protests aside, they do not, nor can they, contend, as the Court in Joshua Slocum was principally concerned with, whether there is any uncertainty as to whether Transform will be able to pay the leasehold cost of approximately $1.1 million a year. Not only has this been confirmed by the witnesses today, but to reduce any economic risk to the mall, Transform has agreed to not only provide a guarantee, but to place one year of leasehold costs into an escrow to protect the mall from any economic risk.

THE COURT: Can I interrupt you there?

MR. CHESLEY: Yes, Your Honor.

THE COURT: it would appear, under the case law pertaining to non-shopping center leases, leases where 365(b)(3) doesn't apply, that the adequate assurance offered would be sufficient. 365(b)(3), though, throws arguably additional factors into the analysis. It begins by saying, for purposes of Paragraph 1 of this subsection and Paragraph 2B of Subsection F, which both require adequate assurance of future performance, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance, A, of the source of rent and other consideration due under a lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the Debtor and its guarantors, if any, as of the time the Debtor became the lessee under the lease.

So I appreciate it uses the word similar, but it creates a test that isn't in the general case law, namely, if you look at the financial condition and operating performance of the Debtor and its guarantors, if any, when they entered into the lease, which was here, 1991, and see whether that's similar to the financial condition and operating performance of the assignee. So the case law does

have -- that applies to this section does have the language you quoted about, you know, no reasonable landlord would feel like it was jeopardized here, but they also go through some analysis, at least, of the condition of the Debtor when it entered into the lease, compared to the financial condition of the assignee.

They usually employ, for the first part of that analysis, for public companies, 10-Ks and 10-Qs. For the second part, if there is a 10-K or 10-Q, they'll look at that; if not, they'll look at projections and testimony. And for new special-purpose entities, they'll look at the experience of the principal, and sometimes, although not always, the not just professed commitment by the principal, but financial stake of the principal in the enterprise.

So, assuming for the moment that that exercise needs to be gone through, that you don't just look at -- you don't just read similar to say similar in assuring performance, whereas, you know, you could say, well performance is just assured, you don't need to go father, are you arguing beyond that? Are you arguing that there is financial information that I should look at?

MR. CHESLEY: Your Honor, we're -- let me break it down into a couple -- answer that in a couple of ways. One, with respect to the financial information that has been presented, you have that. You have the stipulations. I'm

not going to sit here and say that Transform is Sears of 1991. But what the evidence before the Court is, it is the same operating entity that existed, in effect, before bankruptcy -- the same people --

THE COURT: But that's before bankruptcy.

MR. CHESLEY: Correct, Your Honor. Obviously, Sears in 1991 is not the same group of individuals that were running the business prior to October of last year. But I think in looking at that standard, Your Honor, I think there are a couple of things that are critical. One is the legislative history underlying it, and the legislative history made clear that, "The provision of 364(b)(3)(a) was intended to prevent a shopping center lease from being assigned to another business in poor financial condition." There are, to my knowledge Your Honor -- and I'm happy to be corrected, which I often am -- no cases that we have read that interpret similar under 365(b)(3)(a). It is not an issue that has been litigated nor reported on.

THE COURT: Well, there are courts that talk about -- they combine, as I said, the notion of no reasonable landlord would feel jeopardized with proportionate health. Not that the tenant necessarily be as large -- the prospective new tenant as large as the Debtor was when it entered into the lease, but that at least be proportionately as healthy.

MR. CHESLEY: Well, and Your Honor, to that end, as the exhibit from Mr. Frillman confirmed, shareholder equity, at least from the information that was available, is about $2 billion for Transform. That was the information that was made available. It is not what Sears was, but it is also, as the Court knows, a diversified company that is real estate, it is brand, it is ancillary services, it is operating approximately 400 -- actually, 425 retail stores, so it is a viable entity that meets the standard set forth in the code.

And I think what's also critical, and this goes back to the Ames Department Store line of cases, which I'd like to talk about in a minute, but what Ames made very, very clear is, in looking at the standards, you have to look at the lease. And the expectation of these parties when they entered into this lease in 1991 was very clear, that Sears had to operate a retail store for 15 years. After the termination of that operating period, Sears had broad rights, and we'll talk about going dark, to assume, to assign, and had great flexibility for this space. That was what was bargained for.

What was also bargained for was, at the time, an agreement by the parties as to what level of financial assurance the landlord would be looking at, to the extent that Sears wanted to offload or transfer or assign this

property to a third party. And what Section 25 of the REA made abundantly clear is, to the extent that occurs, Sears has no further liability if that party has shareholder equity of at least $50 million.

So, looking at the standards under the code, looking at what the parties absolutely understood at the time as to what would suffice, I think to, in effect, hide behind a strict reading that is not similar, but is absolute, and to compare apples to -- 1991 apples to 2019 oranges, Your Honor, I don't think is what the framers of the code contemplated, and in fact, not one that we see in any of the case law that we have relied upon.

THE COURT: And what about the reference to operating performance, as well as financial performance?

MR. CHESLEY: Well, operating performance is -- Sears is -- Transform is operating Sears stores. Transform is operating K-Mart stores.

THE COURT: Although not here.

MR. CHESLEY: But here, they're not required to operate a store.

THE COURT: So it's the same contract reference point.

MR. CHESLEY: Absolutely, you have to look at the contract. And I think that's really the point here, and that's not what -- if you heard the argument and you heard

the testimony, that's not what the mall is concerned about. What we heard today is, what they're really concerned about is what happens when Transform finds replacement tenants. First of all, as we have confirmed to the Court and the landlord, we intend to comply with all provisions of the lease and the REA. We're not asking for any relief from those provisions, nor do we believe any is necessary here, based upon the language of the lease and the REA.

And so, further to that, Your Honor, if in fact -- and this is where the concepts got conflated -- if in fact the Court is willing to allow the lease to be assumed and assigned and for Transform to, in effect, retain the value that it bargained for, then at that point, if it attempts to assume and assign, or sublease to a third party, it has to comply with the lease. And if it doesn't, nothing here today is vitiating any of the landlord's rights. Unfortunately, those will not be articulated by Your Honor, but likely in a court in Minnesota, but that's all we're seeking to do, is to maintain the benefit of that bargain.

THE COURT: Okay. There's a provision in the lease, 6.3, sale by tenant to landlord.

MR. CHESLEY: Yes, Your Honor.

THE COURT: And it says, in the event that at any time, and from time to time after the expiration of the Sears operating period, which I think everyone agrees is

expired, right --

MR. CHESLEY: Yes, Your Honor.

THE COURT: -- because it was 15 years from 1991, until the term expires, tenant decides to cease and ceases to operate a store in the tenant building, and further determines to sell, exchange, or otherwise transfer its interest in the lease premises, tenant shall, by giving landlord notice first offer, and then there's this fair market value right to exercise that offer. So if Transform finds a tenant, not for the whole three floors, but let's say for a significant portion of one floor, is it prepared to live with this provision?

MR. CHESLEY: We are prepared to live with Section 6.3. And in fact, Your Honor, we have to. If you look at 6.3C, big C, it's a tough agreement to get through, but it makes very clear that -- parties may have been prescient, I don't know. But Paragraph 6.3 does not apply to a transfer in a reorganization or a bankruptcy process. But on the top of Page 17, the foregoing provisions of 6.3 remain binding on the transferee. We agree that this will be binding on the transferee.

THE COURT: Okay.

MR. CHESLEY: So, Your Honor --

THE COURT: So --

MR. CHESLEY: Yes, I'm sorry.

THE COURT: This is a question for both of you, both sides. Again, I'm just thinking ahead in practical terms. Obviously, Mr. Ghermezian was quite concerned about the effect of Transform's assigning a portion of the space to a tenant or a sub-tenant that he believes would jeopardize the -- either the mix of the mall or the mall itself in some way, separate and apart from not being a specifically excluded tenant. And we have the general language that has also been referred to, you know, first class retail mall in 22. But I'm just, in my own head, playing this through. If you find any tenant, then he can exercise this right, right?

MR. CHESLEY: Yes, Your Honor.

THE COURT: It's not limited to the -- you don't have to wait until you've sublet everything. It's any tenant.

MR. CHESLEY: Yes, Your Honor, he has that right. That's what the parties negotiated in 1991.

THE COURT: Okay. Okay.

MR. CHESLEY: So, Your Honor -- I'm sorry.

THE COURT: Well, I -- does Mall of America Corp disagree with that? Well, maybe it's not even a disagreement. I guess it's a representation that's been made.

MR. FLYNN: No, Your Honor.

THE COURT: Okay.

MR. FLYNN: We think they're bound by that.

THE COURT: Okay. All right.

MR. CHESLEY: Just briefly, Your Honor, going back to the other factors that have been relied upon here, and turning back to Joshua Slocum, there have been a lot of claims about the harm that's going to befall this mall if the Court grants this motion. Again, we have to look back at the lease and what rights were contractually given to Sears in 1991, and as the REA and the lease made clear, any assign -- assignees, excuse me, or transferee.

The court in service merchandise again made clear were the lease provisions afford the tenant broad use and assignment rights. The tenant effectively, quote, has free control of the space, which as the court in service merchandise noted met the standards 365(b)(3) as to the issues raised in that case in the Middle District of Tennessee.

A lot of conversation here about the requirement to maintain an anchor or department store. Again, we just turn to the REA. This isn't hard. Section 22(c) of the REA has a very specific detailed provision of the obligations of Sears to maintain a department store for the first 15 years of the lease. Thereafter, the REA goes into substantial discussions about what Sears' rights are, which we have

talked about substantially. But most importantly, it states that Sears further covenants and agrees -- this is on Page 125 -- that during the remaining term of the REA, after the expiration of the major operating period, it then goes on to provide that. We've gone through this language repeatedly. I will not do it again. Sears could use this for retail purposes customarily found in --

THE COURT: But Sears --

MR. CHESLEY: -- an enclosed mall.

THE COURT: Sears and its assignees.

MR. CHESLEY: And its assignee. Its successors and assigns. It says it shall not, except for, and those are the retail activities, non-retail activities customarily incidental thereto, quote, or such other uses and purposes that are compatible and consistent with the regional -- first-class regional shopping center. That's all we're seeking to do, which is to protect that benefit of the bargain, but there is nothing here -- there is no reading of the REA or of the lease that crafts any obligation of Sears or Transform, if this motion is granted, to continue to operate a department store, much like Mr. Ghermezian admitted with respect to the Bloomingdale's store, which was cut up into several tenants over a four-year period.

As to the issue of going dark, while again the landlord claims about the harm of Sears remaining dark under

the lease, beginning in 2006 we have the absolute right to cease operating in the store. As the district court made clear in affirming this court's ruling in Great Atlantic & Pacific Tea Company, while, quote, the store being dark undoubtedly has a deleterious effect on the landlord, the possibility that the store would go dark was contemplated and permitted under the lease.

And as to tenant mix and the mall's claim that the mall is finely curated retail and hospitality venue, again, the lease which controls makes clear that Sears can operate, or its assignee or transferee can operate within these broad parameters.

As the court in Ames made clear again, 365(b)(3)(d) refers to contractual protections and not undefined notions of tenant mix. Quote, it would be anomalous to interpret Section 365(b)(3)(d) to preclude assumption in assignment of a lease where the lease itself affords unfettered rights to assign in some way.

No mistake here, Your Honor. We've made this clear. I'm not going to -- I don't need to make it again. We will comply with the terms of the lease. We will protect the landlord from any economic risk and are incentivized, as everybody is, to bring in replacement tenants as quickly as we can to this center. That's the benefit of our bargain.

In the end, Your Honor, is the declarations filed

by the mall plainly indicate the dispute really isn't about adequate assurance. It's about control. The mall wishes to rid itself of the economic terms of the lease it contractually bound itself to so it can capture and realize the economic benefits of this lease, which everybody acknowledges is in a first-class shopping center, and hand select a preferred tenant that will protect it from the claims of other tenants rather than afford the Debtors and Transform the benefit of its party.

Transference request, if the Court honored the benefit of the bargain, does not in the words of the Mall of America's CEO make us a scavenger, indeed, as the district court noted in A&P, quote, while the landlord's desire to get out of a lease is understandable, Section 365 affords no relief to a landlord simply because it might have the opportunity to rent the premises at higher rents to others and otherwise seek to escape the benefit of its bargain. That's all we're seeking here today, Your Honor. Thank you.

THE COURT: Are you -- in some ways, although the proposed assumption and assignment of this lease was part of the overall asset purchase agreement in which Transform bought substantially all of the assets of the Debtors and propose to continue to use most of those assets. But in some ways, this is -- this lease fits more into the situations where a Debtor entered into -- enters into a

designation rights agreement and for valuable consideration sells the right to a third-party real estate company to designate leases for assumption and assignment, usually to third parties.

MR. CHESLEY: Right.

THE COURT: Are you aware of any cases in the shopping center context where these types of issues have arisen in the context of a designation --

MR. CHESLEY: Of a designation rights, Your Honor?

THE COURT: Yeah.

MR. CHESLEY: None that are published. There were several that we were involved with that were not.

THE COURT: But no published decisions.

MR. CHESLEY: No.

THE COURT: All right.

MR. CHESLEY: And there shouldn't be a different standard, Your Honor.

THE COURT: Well, I mean, it goes to operations. You know, a real estate company that's buying designation rights isn't necessarily going to be operating --

MR. CHESLEY: Right.

THE COURT: -- the stores, for example.

MR. CHESLEY: Well, this is -- as the evidence is before the Court -- it's the nature of this business. It is a hybrid. It is a retailer. It is a real estate company.

And again, we'd continue to operate.

THE COURT: Well, it's the nature of Transform's business.

MR. CHESLEY: Yes.

THE COURT: Not necessarily Sears'.

MR. CHESLEY: Correct.

THE COURT: Although Sears owned a big lease portfolio, and for the last several years has been selling leases.

MR. CHESLEY: Exactly. That's part of the value that we purchased.

THE COURT: Are -- is the -- is MOAC aware of any recorded decisions in the designation rights context?

MR. FLYNN: No, Your Honor, not to date.

THE COURT: Okay. All right. I was -- I couldn't find any either. Okay.

MR. CHESLEY: Thank you, Your Honor.

THE COURT: Do you want to say anything in response?

MR. FLYNN: No. Yes, Your Honor. I would state that he was citing 365(b). The mere collection of rent is not the only thing that's required as a court thing. We have to go further than that.

I would agree that there's been no financial information of any reliable sort that has presented

whatsoever in this case by its own words, number one, and requires to be similar to that of Sears in 1991. There has been no evidence by any expert financial person. In fact, the only evidence submitted by an expert financial was ours, who said it's not anywhere near.

There has been no evidence of performance. They don't intend to perform. They are going to leave it dark. We don't know how long they are, and we are -- and obviously those provisions -- I mean, I -- respecting the Ames court, there is obvious that those kinds of provisions are not required to be in the contract in order to protect the landlord. So that's part of it, and it seems to make some people jar their nerves when they say, well, why are you better off in bankruptcy than you might be outside of bankruptcy? And the answer is because Congress said that. And they didn't say it ambiguously. In fact, amended it to reemphasize it at least once or twice in the last 20 years.

And we have no idea today what's going in that space. We have no idea of the performance ability of the tenant. We have no idea -- and there -- and I cited cases to say more -- to talk about you got -- because typically what happens is you have a tenant, and they don't have what -- and this is a little bit of a hybrid situation, just exactly what you said.

And we have rights under the code, which we would

like to enforce today, and that is require them to show what it is, the proper financial information, not -- and what they said, that's what they gave us, and what they gave us had disclaimers all over it saying don't rely on this. It just -- I don't know what we're supposed to do, not believe it? We're supposed to say, well, we know what they really mean. They didn't mean anything they said on that financial statement. They meant that it was really worth a lot of money. We have no idea what that really meant, and they said don't rely on it. And it certainly can't be used as assurance of anything. It said it right on their document, so we're supposed to know that they don't mean that.

So they didn't present anything about adequate assurance of any kind, and especially about whether or not it's similar to or -- to Sears' financial position in 1991, nothing. And it's really important.

We are not -- we don't want the equity in that lease. What we want is a successful mall, and they will not and cannot -- and they say if they don't make -- they don't get the money out of this thing, give it to somebody who would be appropriate to a mall because they can't get the rent out of that. They'd have to give -- the current market for any kind of major tenant is you pay them to come in. They're not going to do that, so they're going to try to chop it up. And every time -- they have to prove today, I

think -- it will be our position -- what that is, who they are, whether they fit with the tenant mix, and they presented no evidence of that. Zero.

And they -- and I get the argument that they say they can. We would disagree with that vociferously.

THE COURT: What's your responses to the fact that the parties agreed in Section 6.3 to give the landlord the protection of a fair market right of first offer?

MR. FLYNN: I think that that is wonderful they're agreeing to do that. We didn't know for sure that they were, and we understand that now they are. Our position is that we have rights in this courtroom today in addition to that, and we would like them to be recognized.

THE COURT: But as far as the economic impact on the mall is concerned, either -- or the -- you know; however you express that, either in the property itself or the effect of tenants on the whole mall, the landlord does have the course under the lease.

MR. FLYNN: Yes. However, we read it as saying in bankruptcy that they have a limited period of time. They don't have 70 years to try to rip that space out. They can't leave it dark for an unusually -- as I believe (indiscernible) said, even though in the lease it allowed them to go dark. And we would like some protections from that because if it sits there empty and they can't rent it,

and the only people that will come in there will not pay them enough rent, even though they'd be wonderful tenants there, we have a -- they're calling us. We want all the money. We're willing to pay money to get somebody in there.

I think -- but they might not have a tenant, or they might hold out for 70 years. What -- we're here in bankruptcy. We have more rights than that, and that Congress gave us those, and we're worried about those issues. So at a minimum, we'd need some period of time that want this to not go dark. At a minimum, we'd like to reserve our right to buy them out if it's -- yes, but we have other rights here today, and we don't think they presented any evidence on those other issues.

And it's very clear, obviously the courts have given us rights beyond what are contained in our contract. There's no contract in the world that says you can't assign this lease unless you have same or similar to the -- I think; maybe they do -- to Sears. They don't -- they didn't prove that.

Anyway, we would like our rights recognized here in this court today, and yes, we feel the -- once they assume the lease, they are bound by all its terms, but they claim they could rent it.

There are a number of provisions in the lease that maybe perhaps we'll have to litigate in the future about

what they can and can't do because we disagree about those. But I think -- I appreciate the court considering that our rights today is important to us. And --

THE COURT: Sorry to interrupt. In Mr. Ghermezian's testimony, he did not know when the form of Bloomingdale's space was fully sublet, but you did testify that the store was closed in 2012. Is there anything in the record to show when the first subleasing or tenancy was?

MR. FLYNN: No, Your Honor.

THE COURT: Oh.

MR. FLYNN: And just as an aside. I don't think it's controversial. It isn't -- still isn't sold but rented.

THE COURT: Well, I'm more focusing on the --

MR. FLYNN: Yeah.

THE COURT: -- buyout provision.

MR. FLYNN: Right.

THE COURT: I mean, I -- let me pose this question to the Debtor, all right, to Transform. Is Transform prepared to put some outside date on its first assignment of the property or subletting of the property? I mean, the prospect of just standing there and torturing MOAC for 73 years is, you know, obviously not a welcome one.

MR. CHESLEY: Well, it makes no economic sense for us either at $1 million a year. If I could talk really

briefly with Mr. (indiscernible), I can probably answer this relatively quickly --

THE COURT: Okay.

MR. CHESLEY: -- Your Honor. If I can.

Your Honor, I think it's consistent with the declaration as well. We could certainly live with the two-year outside date provided that we don't get interference from the landlord. If we've got the ability to go out and bring people in -- I'm not asking them to bend over backwards but, again, not interfere with our ability to sublet.

THE COURT: Two years to sublet some -- or assign some portion of this thing.

MR. CHESLEY: Yes, Your Honor.

THE COURT: Okay.

MR. FLYNN: Your Honor, may I address that?

THE COURT: Sure.

MR. FLYNN: That may be very little solace. There's three huge floors there. They could -- are they going to sublet --

THE COURT: No, I understand that, but I'm focusing -- you don't have to -- I'm not asking you to agree with me. I'm focusing on 6.3. If they sublet any, you know, any other than, you know, on, you know, a tobacco stand or something -- if they sublet anything, 6.3 kicks in,

and the landlord --

MR. FLYNN: Yeah.

THE COURT: -- isn't stuck then.

MR. FLYNN: Right.

THE COURT: Then they can do something.

MR. FLYNN: And we do appreciate that.

MR. CHESLEY: And similar, Your Honor -- I'm sorry.

MR. FLYNN: Excuse me. Giving them two years, is it the whole thing? Is it by floor?

THE COURT: No, no, no. My question was any -- no -- anything other than immaterial portion.

MR. CHESLEY: The only point I was going to add to that, Your Honor, is Section 6.3 also has a second clause that deals with if we're not able to, and we can simply submit that to evaluation.

THE COURT: Right. Wait. I'm sorry. Say that --

MR. CHESLEY: Section 6.3 has two clauses, Your Honor.

THE COURT: Right.

MR. CHESLEY: The first clause -- I'm sorry. I don't have it front of me, but the first clause refers to if we find -- basically are looking to transfer it to a third party.

THE COURT: Right.

MR. CHESLEY: There's that -- there's that provision. And if we can't --

THE COURT: Then you have the fair market value.

MR. CHESLEY: Exactly, through two appraisers.

THE COURT: Maybe I have it -- let -- if you'll just give me a second to read this more carefully.

Oh, well, you know what? I'm sorry. This provision -- I was really just focusing on the first offer point, but there is a second point. So if we can just look through this together.

In the event that at any time and from time to time after the expiration of the Sears operating period and until the term expires, tenant decides to cease and ceases to operate a store from the tenant building and further determines to sell, exchange, or otherwise transfer its interest in lease premises, tenant shall by giving landlord notice first offer to landlord the right to purchase the same at the price offered to tenant pursuant to a (indiscernible) offer, or if no such offer has been made to tenant at a price equal to the fair market value --

So it seems to me that subject to, you know, some modest time that courts give assignees to, in essence, get their act together after an assignment where the assignor/Debtor had ceased to operate, the market value kicks in right away under this provision. You don't have to

get a first offer. It just kicks in right away.

MR. CHESLEY: Yeah. I believe Your Honor is -- Your Honor is reading it correctly. There are two requirements at the front end: ceasing operation and further determines to sell, exchange, or otherwise transfer.

THE COURT: But that's happened, right

MR. CHESLEY: We are --

THE COURT: I mean, that's the whole -- that's the whole purpose --

MR. CHESLEY: We are very much at that.

THE COURT: -- of the two declarations.

MR. CHESLEY: And so, again, to the point of --

THE COURT: So you don't have to wait at all, in other words. You know? I mean --

MR. CHESLEY: We would certainly like the ability to see -- you know, again, to finish up what we could.

THE COURT: I understand, but this provision seems to suggest the other one. I mean, unless you're saying that this is an anti-assignment provision, and I don't think you were saying that.

MR. CHESLEY: No.

THE COURT: Because I think this fair market kicks in right away.

MR. CHESLEY: Mr. Martin pointed out, again, ceasing to operate, if we are a real estate company, is

different than operating a store.

THE COURT: No, but this is a store. Ceases -- and cease to operate a store.

MR. CHESLEY: Right, a store in the tenant building --

THE COURT: Yeah.

MR. CHESLEY: -- and further determines the sale.

THE COURT: Right. So I think all we're talking about here is who gets the fair market value. All the rest of it -- I mean, it's in the landlord's control. I understand your arguments about the statute. You don't have to -- but ultimately, in terms of value --

MR. CHESLEY: We agree this is about the value, Your Honor.

THE COURT: Right. I mean, and the parties agreed to a mechanism to deal with it in which MOAC can say, well, there's no value here because we have to pay a tenant, and Transform would say there's enormous value here.

MR. CHESLEY: We agree, Your Honor.

THE COURT: Okay. All right. All right. Anything else?

MR. FLYNN: Nothing, Your Honor.

THE COURT: Okay. I have before me a motion by the -- technically by the Debtors in this case to assume and assign a lease with now Mall of America Corporation, or

MOAC, of a substantial portion of the mall operated by the Mall of America in Minnesota. The assignee is Transform Holdco, and the assignment is part of the consideration -- that is seeking the assumption of assignment is part of the consideration supporting Transform Holdco's purchase price under the asset purchase agreement between the Debtors and Transform.

The landlord, MOAC, objected to the assumption of assignment, asserting that it does not comply with the applicable requirements of Section 363(b) and Section 363(f), which pertains to assignments of the bankruptcy code.

The parties have stipulated to a number of key facts here, which are agreed and part of the evidentiary submissions by the parties.

In addition, I have an agreed set of exhibits as well, which include the lease and the amended and restated reciprocal easement and operating agreement portions of which are incorporated into the lease, which the parties refer to as the REA.

I also have testimony from two witnesses for Transform and three from MOAC. Notwithstanding that substantial evidentiary record, the merits of the issues before me come down largely to disputed interpretations of the applicable requirements under Sections 365(b)(3) as

incorporated and 365(f). 365(b)(3) was enacted by Congress to provide additional protection for landlords and, under appropriate circumstances, other tenants in what Congress defined as shopping centers.

There is no dispute between the parties that the Mall of America is in fact a shopping center as defined in -- or for purposes of, rather -- Section 365(b)(3) and therefore that Section 365(b)(3) would apply.

That provision is introduced by the following. For the purposes of Paragraph 1 of this section and Paragraph 2B of subsection F as an aside, each of which require adequate assurance of future performance of a lease that is being assumed. Adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance, and then four different included types of adequate assurance are listed.

That provision doesn't exclude or exempt Debtors and their assignees from providing adequate assurance generally under 365(b)(1) and (f)(2)(b), but it adds the four enumerated additions.

I should preface the remainder of this ruling by noting, as stated aptly by former bankruptcy Judge Gerber in In re Ames Department Stores Inc., 348 B.R. 91, 98 (Bankr. S.D.N.Y. 2006), quote, in a legislative judgment built into the code, Congress has determined that subject only to

certain statutory safeguards, the value of a Debtor's leases should go to the Debtor's creditors and that leases can be sold to achieve that end, with or without landlord consent. That theme runs throughout the caselaw, interpreting Sections 365, including, as noted by the district court and (indiscernible) LLC the A&P, In re A&P 472 B.R. 666, 679 (Bankr. S.D.N.Y. 2012).

It's also important to note that the four protections specifically provided for in connection with adequate assurance of future performance of a shopping center lease is with respect to just that: adequate assurance of future performance of a lease of real property, i.e. the focus is on performance of a lease in the future.

Before turning to those sections, I should note the following. Based on the record before me, it is clear that Transform, the assignee, separate and apart from those four sections has, in fact, provided adequate assurance of future performance of the lease.

The caselaw is clear when dealing with adequate assurance generally that the Court should employ a pragmatic analysis as to whether sufficient assurance has been provided that the lease will be performed in the non-shopping-center context that focuses generally on the ability to pay rent on a going-forward basis, both the specific rent and other financial performance such as

payment of taxes, common area maintenance charges, and the like, which are either denominated as rent or a separate financial obligation under the lease.

It is not an absolute guarantee but rather focuses on whether performance is likely, i.e. more probable than not. See generally in re M. Fine Lumbar Co. 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008) and the cases cited therein.

And yet outside of the (b)(3) context, it is routinely held that adequate assurance can be shown in large measure simply by the fact that the lease itself is a favorable lease, i.e. favorable to the tenant, and has significant value. The theory being that even if the tenant defaults, the landlord will not be damaged because it will be able to reap the value of the then-terminated lease, at Page 573.

In addition, courts very typically look to some form or other of security deposit, either in the form of a letter of credit, escrow agreement, or deposit with the landlord. If necessary, they go further to examine the assignees financial condition, although they are perfectly willing to accept a newly formed entity as an assignee, particularly where there is a sufficient security deposit or escrow, and the newly formed assignee is run by a principle that has substantial experience in whatever business the assignee intends to conduct and has a financial stake in

that business succeeding.

Here, it appears clear to me that this lease is a very favorable lease. The stated rent under the lease is $10 a year. Parties agree that the aggregate monetary obligation of the tenant, which includes an obligation to pay its share of taxes and other common charges and fees, is somewhere between 1,000,001 and 1,000,002 annually.

The assignee has committed to put into escrow, and it would obviously have to be an escrow that has no strings attached to it other than the occurrence of nonpayment that sum of money.

In addition, it's clear to me from the record and, in addition, documents with which I can take -- of which is could take judicial notice of the docket of this case that the assignees' senior management has extensive experience in marketing and selling Sears' real property, including favorable leases.

In addition, although I don't believe under the circumstances this would be necessary for finding adequate assurance for future performance under Section 365(b)(1) and (f)(2)(b), it appears to me that Transform has successfully completed substantial financings with respect to both its operating portfolio and its real estate portfolio.

While I do not believe I can accept as whole -- however wholly the statement in the draft consolidated

financial statement offered by Transform as part of its showing of adequate assurance of future performance that it has in excess of 250 million of equity. I do believe that it has substantial equity and that it's highly likely that that equity exceeds $50 million. I cannot believe that third-party lenders would provide the level of financing that they have to transform without at least that level of solvency.

The legal support for all of the foregoing discussion of the applicable standard, in addition to the M. Fine Lumber case that I just cited can be found in numerous cases which focus on the foregoing types of adequate assurance, and the fundamental focus on the assignee's ability to pay rent, as stated by the District Court in In Re Sanshoe Worldwide Corp. 139 B.R. 585, 592 (S.D.N.Y. 1992). See also In Re Citrus Tower Boulevard Imaging Center, LLC., 2012 Bankr. LEXIS 2208 at Pages 15 through 20, (Bankr. N.D. Ga. Apr. 2, 2012), In Re Bygaph, Inc., 56 B.R. 596 (Bankr. S.D.N.Y), In Re Westview 74th Street Drug Corp., 59 B.R. 747, 755 (Bankr. S.D.N.Y. 1986), and In Re Casual Male Corp, 120 B.R. 256, 264 (Bankr. D. Mass. 1990).

The party dispute therefore hinges on the meaning and purpose of Section 365(b)(3) and how and/or whether it adds additional requirements beyond those that I've already found are met for adequate assurance of future performance.

Both sides recognize that the legislative history of this section is fairly substantial. It recognized the harm to landlords, and through them other tenants, non-Debtor tenants in shopping centers which are operated on an integrated basis that could result from the assignment of a lease of real property for one portion of the center.

Legislative history also makes it clear, however, that the underlying purpose of the provision, consistent with the notion of adequate assurance for future performance of a lease generally is that both sides, including the landlord, get the benefit of their bargain, which I believe it goes without saying, is the bargain memorialized in their lease.

It is also the case, which is well-recognized, that Section 365(b)(3), as is the case with Section 365(b)(1) and (f)(2)(B), is subject to another provision of Section 365, 365(e), which in essence invalidates with respect to an assumption or an assumption and assignment the efficacy of provisions conditioned on the insolvency or financial condition of the Debtor any time before the closing of the case, the commencement of the case under this title, or the appointment of or taking possession by a trustee in a case under this title, with exceptions stated further on in the section.

However, although that section does find some

important interpretation in case law that the parties have cited, it is not really at issue in the present dispute before me, which really hinges again on what the effect of Section 365(b)(3) has on what I've already found is adequate assurance of future performance by the assignee.

That dispute really falls into two categories: first, the landlord points to Section 365(b)(3)(A), which states, again with the lead-in, that adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance, A, of the source of rent, and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the Debtor and its guarantors, if any, as of the time the Debtor became the lessee under the lease.

Sears became the lessee under the lease in 1991. It's undisputed that its operating performance at that time and financial condition generically is superior to the financial condition and operating performance of Transform. Sears at that time had over 3000 stores. Its business as a whole, as evidenced by the public financial filings in the record showed a far more substantially -- far and larger business than Transform has. Under the asset purchase

agreement, Transform acquired roughly 600 leased locations, of which it proposed to operate approximately 425, which it has now reduced to approximately 400.

Moreover, with respect to this particular leased property, Transform does not propose to operate the property as Sears initially would operate it. Rather, Transform is quite clear in stating that it is taking, proposing to take the assignment for the sole purpose of reassigning or subletting the space at a profit. That is, to take advantage of the economic value of the lease.

There are not a lot of cases construing this provision. In fact, I have found only three. Each of them makes it clear that it is to be construed not in a mechanical way, but rather consistent with the underlying charge as set forth in the preface to it, the general language in Section 365(b)(3) which again refers to adequate assurance of future performance of the lease itself. The District Court for the Southern District of New York affirmed the determination by the Bankruptcy Court of In Re Ames Department Stores, Inc. 2003 U.S. District LEXIS 3150 (S.D.N.Y., March 5, 2003), in which Judge Gerber concluded that the assignee had satisfied this subsection.

As the District Court stated, quote, "The Landlord further argues that Judge Gerber 'erroneously appl[ied] financial aspects of [the May 19, 1999] financial

statement,'" that is, the statement when the lease was originally entered into, "'selectively to emphasize 'similarity' while ignoring other aspects in which enormous differences in financial condition and operating performances were evident.'

The Landlord argues that comparison of Debtor's 'per-store sales and profit' to Building 19's," as the assignees, "'completely disregard[s] the incomparable difference in financial depth and resources which [Debtor] had.' The Landlord goes on to argue that a finding of "similarity" under 365(b)(3)(A) requires that 'big box' 'tenants' should be replaced by other 'big box' tenants."

The District Court then goes on to say again, I'm still quoting, "the landlord's arguments find no support in the case law. In support of its argument, defendant cites language in In Re Casual Male Corp, 120 B.R. 256 (Bankr. D. Mass. 1990) that the financial condition and operating performance of [the assignee] must be at least as strong as was the Debtors' [at the time the lease was executed].

But In re Casual Male does not stand for the proposition that a Bankruptcy Court cannot apply a proportional comparison of the financial health of the assignee and the Debtor; indeed, the Court in that case specifically compared the ratio of the assignee's assets to current liabilities at the time of the assignment to the

Debtor's ratio of assets to liabilities on the date the Debtor acquired the lease.

The court in In re Casual Male," I'm still quoting, "went on to hold that since the assignee was recently incorporated, its operating performance was dependent on the business experience of its sole owner and operator. Accordingly, the Court found the strength of the owner-operator's experience compared favorably to the actual strength of the Debtor's operations. Thus, the Casual Male court's determination of the similarity of profitability and operating performance in no way relied upon a construction of the statute to require the same gross profits and performance between assignee and Debtor in that case."

I'll note also that in the Casual Male Corp case cited by the Ames Court, the Bankruptcy Court's focus was based on "the statute's prime purpose to provide adequate assurance for the future payment of rent." And the Court found, as I've already found, that that issue was not in reasonable doubt.

A similar approach was taken by the District Court in Ramco-Gershenson Properties L.P. v. Service Merchandise Company, 293 B.R. 169 (M.D. Tenn. 2003). There, the Court concluded, based on a number of factors, including guarantees and fairly limited financial disclosure, that "a reasonable landlord would have been adequately assured of

future operating performance."

This issue, i.e. the meaning of Section 365(b)(3)(A) bleeds over into the second issue that the parties disagree on, which is whether the Court should read the four requirements in Section 365(b)(3) separate and independent from the party's lease from which adequate assurance of future performance is at issue. Transform contends that these provisions must be read, and cabined by the parties' actual agreement, says the purpose of the statute is to give not only the Debtor the rights of 365, but the landlord the benefits of its bargain.

MOAC contends to the contrary, that these are separate requirement, independent from what the parties agreed to. This issue is relevant as to what Congress intended in Section 365(b)(3)(A) in part because under the lease at issue, it is clear that after the first 15 years of the lease, and by the way, the lease with extensions runs for a total of 100 years, but after the first 15 years, the tenant, its successors and assigns, is subject to certain very weak limitations, free itself to cease operating, and to assign its rights. The parties imposed a specific prohibition in Section 25 of the lease, that the tenant have $50 million of shareholder equity, far less, I believe than Sears had when it entered into the lease, at least according to its public financial statements or financial filings in

1991.

If -- and when I say Section 25, I'm referring to the Rea, which is incorporated -- that particular section is incorporated into the lease. According to the proposed assignee, Transform, I should look at the reference to financial and operational performance, in light of what the parties actually agreed to and determined was relevant to the right to assign. The landlord states that the contract between the parties is essentially irrelevant.

I conclude, for purposes of this section, as well as the other three subsections of 365(b)(3) that each requires reference back to the party's actual agreement, and that Congress did not create independent requirements that would not go to actual assurance of future performance, but rather wanted to focus the Court on, obviously still subject to Section 365(e), taking into account the landlord's rights under the lease, as implicated by these four subsections.

The case law in support of that view is extensive and persuasive. Perhaps the best analysis is again in the Ames Department Stores bankruptcy case, this time appearing at In Re Ames Department Stores 127 B.R. 744 (Bankr. S.D.N.Y. 1991). In that opinion, the Court was not interpreting Section 365(b)(3)(A), but rather (b)(3)(D), which states that adequate assurance of future performance of a lease of real property, a shopping center, includes

adequate assurance, that assumption or assignment of such lease will not destroy any tenant mix or balance in such shopping center.

In the Ames opinion, former Bankruptcy Judge Bushman notes again that the entire section is prefaced by a reference to adequate assurance of future performance of such contract of the lease itself obviously with the focus on the lease. He then noted the purpose of the statute, which was to protect the bargain between the parties, and finally noted the general bankruptcy law principal that unless specifically provided for in the Bankruptcy Code, bankruptcy does not rewrite the parties' non-bankruptcy bargained-for rights.

He concludes, "where there is no indication of any intention by Congress to do anything other than hold a shopping center Debtor-Tenant to its bargain with a landlord and to leave intact the property interests of debtor and landlord as set forth in that bargain, the Courts should not imply an additional non-bargained-for term. To construe the statute in the manner urged by," in that case the landlord, "would be 'a flight of redistributive fancy.'" That appears at Page 753.

That case law has been followed rather uniformly since then, including by the District Court in In Re A&P, 472 B.R. 678 through 679, again in connection with the

tenant mix issue, and In Re Toys R Us Property Company, 2019 Bankr. LEXIS 440 at Page 13 (Bankr. E.D. Va., Feb. 11, 2019). The landlord has contended that there are other cases going in the opposite direction and imposing a separate requirement that would not appear in the parties' lease under Section 365(b)(3).

Namely, it asserts In Re Rickel Home Centers, 240 B.R. 826, appeal dismissed, 209 F. 3d. 291, 3rd Cir. 2000, cert denied, 531 U.S. 873 2000. And In Re Casual Male Corp., 120 B.R. 256. A close reading of those cases does not really support that contention. In Rickel Home Centers, the primary purpose of the court throughout, in response to various landlords' objections in a shopping center context, to an assignment whereby the assignee would only occupy a certain part of the store, the store would go dark for a period of time, and the like, was as to the application of 365(e) to those contractual restrictions. And the Court concluded that, with limited exceptions, 365(e) should in fact, apply to invalidate those contractual restrictions, as a restraint based on the Debtor's financial condition of the right to assign.

One of the three landlords raised an objection, again under 365(b)(3)(d), based on not its contractual provision, but the general notion that tenant mix must be maintained, even if there is no such contract. The Court

concluded that under 365(e), the proposed assignee should be given a reasonable time to sublet the premises, which the subtenant agreed, in addition to stating that it would do so as quickly as possible, would be the specific time period that it stated it could do it in, which was, the assignee proffered six months. The Court accepted that commitment and overruled the objection.

But it first noted, although it did not have to rule on this basis, "The Court notes that the Bethlehem lease does not contain any provision prohibiting going dark to this extent. Net cannot argue that the assignment from the Debtor to Staples will interfere with any provision of the Bethlehem lease." It then went on to conclude that in any event, that I'm by which the assignee would be taking to sublet the premises was not unreasonable.

In Casual Male, the focus of the Court, as I stated, was on Section 365(b)(3)(A), but given the deposit of six months' rent in advance, and the support by the newly-formed tenants' principal, as well as working capital loan from its principal, that was sufficient similar financial condition and operating performance. One cannot take away from that decision, which of course would not be controlling precedent on me anyway, the belief that Congress created a new standard in Section 365(b)(3), that would override the parties' own agreement as a limitation on

assumption and assignment.

I will note one other case, In Re TSW Stores of Nanuet, Inc., 34 B.R. 299 (Bankr. S.D.N.Y. 1983), in which the Court again interpreted a restrictive use covenant and then went on to hold that it appeared in this situation there would be economic detriment to the landlord based on the respective assignee's stated intention to vary that covenant or breach it.

I conclude therefore that based on my general -- my findings with respect generally to adequate assurance of future performance, the differences in financial condition and operating performance are not such as to preclude the assignment of this lease, which has its own limitations on assignment in it, which I have found the Debtor and the assignee have satisfied.

For the record, I also conclude that if that legal determination is incorrect, and that the case law is cited and follow on the grounds of stare decisis is incorrect, then the financial condition and operating performance of Transform is not similar to Sears in 1991. Transform has not carried its burden to show, for example, that the ratio as far as its financial health, is the same, notwithstanding that it has shown that it's sufficiently financially healthy, when coupled with the favorable nature of the lease and deposit of an amount equal to the annual projected

monetary payment under the lease, that it is sufficiently healthy.

There's no issue as to percentage rent under the lease, and I believe I've already addressed the tenant mix point. But let me reiterate that there's no specific provision in the lease, other than a broad provision in Section 22(c) as to Sears and its assignee's right to use and assign the property, limiting tenant mix. Such broad provisions are well-recognized as not precluding an assignment generally in the shopping center context. See Ramco-Gershenson Properties L.P. v. Service Merchandise Company, 293 B.R. 169, for example. The lease also has very broad rights pertaining to use restrictions after the major operating period, or the tenant operating period, which the parties agree has already expired. And I do not believe that given that Transform will be bound by those broad use restrictions, and acknowledges it will be, that it's violating them as an assignee.

My determination with respect to the effect of 365(b)(3) is guided with respect to this lease by one other consideration. Based on the testimony before me, it appears to me that the landlord's main, if not primary, if not only, rather, concern is not necessarily to affirmatively usurp the value of the lease for its own benefit, as is the case in most of the cases cited, where the lease is favorable,

and the landlord has objected.

Rather, it appears to me that the landlord desires to control the property for the aggregate benefit of itself, which may mean that it would cut another very favorable lease to an anchor tenant. That does, in the abstract, fit into or conform with Congress's overall concern when enacting Section 365(b)(3), that the Court take into account the overall effect of the assignment on the shopping center and the landlord's interest in it.

However, consistent with my view and the Court's view, generally, that 365(b)(3) is to be interpreted in light of and limited by the parties' actual agreement, I note that Section 6.3 of the lease provides that "in the event that at any time, and from time to time after the expiration of the Sears operating period," which again has expired, "and until the term expires, the tenant decides to cease, and ceases to operate a store in the tenant building," which we know has occurred, "and further determines to sell, exchange, or otherwise transfer its interest in the leased premises," which we also know has occurred, "tenants shall, by giving landlord notice, first offer to landlord the right to purchase the same, one, at the price offered to tenant pursuant to a bona fide offer in a good faith, arms' length transaction, when a prospective purhcaser-assingee, unrelated to tenant, and on the same

terms and conditions offered to tenant, or two, if no such offer has been made to tenant at a price equal to the fair market value of tenant's leasehold estate, including the value of its improvements.

And the parties then set forth a half-page mechanism of how that fair market value would be determined. It has often been held that rights of first offer are among the types of provisions and leases that trigger Section 365(e)'s prohibition on, or exemption from performance by a Debtor of provisions based on the Debtor's financial condition, that would preclude or prevent assignment, or as found in 365(f). Here, Transform has chosen not to make such an argument. Rather, it is stated on the record, it accepts that if it becomes the assignee of this lease, it will be bound by al the terms of the lease, including this provision. Well, let me back up. It is confirmed on the record it will be bound by this provision.

It appears clear to me then, first that the parties actually, in keeping with their sophistication, contemplated an event like this, and spelled out their bargain as to what would happen in Section 6.3. And secondly, that the landlord in this section bargained for a measure of control in the event, which is what has occurred here, that the tenant ceases to operate a store in the property, and is looking to sell the leased premises.

So it actually does, in fact, have the control that it has stated, is its primary concern. And the issue then is simply, I believe, one where the parties are fighting over who has the right to the fair market value of the estate: the Debtor, by selling it to Transform, that is the leasehold estate: the Debtor, by selling it to Transform, or the landlord, by convincing the Court that its interpretation of 365(b)(3) preclude such an assignment. So, if Congress did, in fact, intend those provisions to, in the balance, between giving value to a Debtor and its creditors, and protecting the landlord, provide additional requirements, the parties' contract in fact does protect the landlord, while preserving the fair market value for the Debtor through an assignment to Transform.

I also will note finally that transform has represented on the record today that even if the landlord does not take up the -- or not exercise its right, under Section 6.3, it will not hold the landlord in suspense over tis commencement of reletting the premises for the full term of the lease, which has 73 more years to run, but rather will cap the outside date by which it will at least commence reletting the premises for two years on the condition that the landlord will not interfere with its marketing process.

The testimony is certainly not ample on this topic. I have the declarations of Transform's witnesses, as

well as the cross-examination of Mr. Ghermezian, but it appears to me that two years is not an unreasonable amount of time for a property like this to enter into at least one material sublease or assignment, which again, subject to the broad, or, well, their phrase, weak restrictions in the lease, Sears and its assignees have an absolute right to do. That testimony reflects a judgment first by Transform's witness, that such a period is a reasonable one, as well as the testimony on cross-examination that it took years, in the plural, to sublet the premises after the closing of the Bloomingdale's store at the mall.

So in light of all of that, I conclude that the objection should be denied, and that the assumption and assignment motion should be granted. It is again, subject to the representations made on the record today by Transform with respect to the operation of 6.3 of the lease, and the initial subletting of a portion of the premises within two years, on the condition that the landlord not interfere. So I'll ask Transform's counsel to submit an order to stipulate that ruling.

MR. CHELSEY: We will, Your Honor. We will obviously pass that by counsel (indiscernible). Thank you, Your Honor.

THE COURT: Okay, you don’t need to formally settle it, but you should circulate it to MOAC's counsel.

MR. CHELSEY: We will, Your Honor. Thank you.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 2:25 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Landanski Hyde

Digitally signed by Sonya Landanski Hyde
DN: cn=Sonya Landanski Hyde, o, ou, email=digital1@veritext.com, c=US
Date: 2019.08.28 15:43:13 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: August 28, 2019